

NOTES

ATTEMPT TO ASSIGN INTEREST IN A SPENDTHRIFT TRUST*

THE DANGER that *cestuis* of a spendthrift trust will take undue advantage of the protection afforded them has led to a search for conceptual devices by which, without rejecting this type of trust, the possibility of abuse may be forestalled. A California court recently employed such a fiction to hold to his bargain a husband who had attempted, as part of a property settlement, to assign to his wife one half of an inalienable interest coming to him as remainderman under a testamentary spendthrift trust. The income from the trust had been paid to the husband's mother subject to a spendthrift clause, and, upon her death, the corpus was to go in fee to the son,¹ protected by the same spendthrift restraint, fully effective under the law of Pennsylvania,² where the testator lived. When the life beneficiary died, the divorced wife sought to reach half of the specific *res* in the hands of the trustee.³ Rebuffed by the Philadelphia Orphans' Court where the instrument had been probated, she later brought suit in California, asking for a personal judgment against her husband, who had come into possession of the fund. After giving lip service to the Pennsylvania decision, the court found the instrument, though worded as a present assignment, was in effect a "contract to assign." Since the defendant had breached the contract, the wife was held entitled to damages equal to a half interest in the corpus.⁴

Since this case arose because Pennsylvania surrounds the remainderman under a spendthrift trust with the protection generally accorded only to a beneficiary of the income, the particular problem presented would not often be raised.⁵ But the decision is none the less significant in that the reasoning

*Kelly v. Kelly, 79 P. (2d) 1059 (Cal. 1938).

1. For the wording of the trust, see Kelly v. Kelly, 79 P. (2d) 1059, 1061 (Cal. 1938).

2. Beck's Estate, 133 Pa. 51, 19 Atl. 302 (1890), Goe's Estate, 146 Pa. 431, 23 Atl. 383 (1892); cf. *In re Hall*, 248 Pa. 218, 93 Atl. 944 (1915); *Denniston v. Pierce*, 260 Pa. 129, 103 Atl. 557 (1917).

3. There is an increasing willingness, both at common and statutory law, to allow the *cestui's* dependent wife to levy on his interest for support. See Griswold, *Reaching The Interest of the Beneficiary of a Spendthrift Trust* (1929) 43 HARV. L. REV. 63, 64; Comment (1932) 21 CALIF. L. REV. 142, 148. Alimony has also been given special preference by some courts. See *Burrage v. Bucknam*, 16 N. E. (2d) 705, 707 (Mass. 1938) (listing authorities and arguments). But the property settlement, having its roots in voluntary contract, is regarded in a far less favorable light than support and alimony decrees, which are the result of judicial investigation. See Comment (1931) 19 CALIF. L. REV. 532.

4. Kelly v. Kelly, 79 P. (2d) 1059 (Cal. 1938); (1938) 23 MINN. L. REV. 110.

5. No other state goes quite to the extreme that Pennsylvania does in allowing an immediate right to receive the principal of a trust to be subject to a valid restraint on alienation. See note 2, *supra*. But at least two other states go almost as far in upholding restraints on alienation of principal held for the beneficiary until he attains a certain age. *Wallace v. Foxwell*, 250 Ill. 616, 95 N. E. 985 (1911); *Boston Safe Deposit*

would be equally applicable to attempted alienation of income, and of all the jurisdictions which have passed on the question there are only four which do not allow some form of spendthrift restraint upon the recipient of trust income.⁶ It is the essence of the spendthrift trust doctrine that the *cestui* cannot assign away his rights to income,⁷ whether the assignment arises from an honest property settlement or from any other bona fide transaction. Yet if the assignment is treated as a contract to pay in the future, an opposite result is reached, apparently without sacrificing logic or defeating the fundamental purpose of the trust.

In related situations this concept is by no means a new one.⁸ The beneficiary of an inalienable veteran's pension has been allowed to contract away his interest.⁹ Similarly, a claim against the United States, non-assignable by statute, may be made the subject matter of a partnership contract.¹⁰ Here, as in the case of the spendthrift trust, any present assignment is specifically forbidden, but courts are able to achieve the desired end by utilizing the fiction of a contract to be performed in the future. Another analogy is apparent in the cases where a conveyance of land which fails at law will be construed as a contract to convey, enforceable in equity,¹¹ a concept likewise recognized in the law of sales¹² and incorporated in the Uniform Sales Act.¹³ In situations of this sort, however, present conveyance is not forbidden, and the construction is necessary only when an instrument has a fatal technical defect. But a third and better analogy is found in an expectancy in a decedent's estate, which is deemed too indefinite to have any status as a property interest and therefore cannot be assigned. If a court feels the bargain to assign the expectancy a fair one, it may be enforced by adopting the contractual device.¹⁴

The concept of a contract to assign has, however, apparently only once before been urged in a court of last resort as applicable to spendthrift trusts.

and Trust Co. v. Collier, 222 Mass. 390, 111 N. E. 163 (1916). For criticism of this rule, see Scott, *Control of Property by the Dead II* (1917) 65 U. OF PA. L. REV. 632, 645; (1916) 29 HARV. L. REV. 557; cf. Kessner v. Phillips, 189 Mo. 515, 88 S.W. 66 (1905).

6. See, generally, GRISWOLD, SPENDTHRIFT TRUSTS (1936). In eight states the question of the spendthrift trust has not arisen. Of the remaining forty, twelve recognize it at common law, twenty-two have adopted it by statute, two are in confusion and only four flatly repudiate it. The jurisdictional variations of the spendthrift doctrines are subjected to critical analysis in a recent survey. N. Y. LAW REVISION COMM., RECOMMENDATION AND STUDY RELATING TO THE RULE AGAINST PERPETUITIES AND SPENDTHRIFT TRUSTS (1938) 313-361.

7. See 1 BOGERT, TRUSTS AND TRUSTEES (1935) § 18.

8. *E.g.*, Shellabarger v. Commissioner, 38 F. (2d) 566 (C. C. A. 7th, 1930); cf. Kerr v. Crane, 212 Mass. 224, 98 N. E. 783 (1912).

9. Bostrom v. Bostrom, 60 N. D. 792, 236 N.W. 732 (1931).

10. Hobbs v. McLean, 117 U. S. 567 (1886); cf. Burck v. Taylor, 152 U. S. 634 (1894) (an attempted assignment of a non-assignable building contract with the state); see also Portuguese-American Bank v. Welles, 242 U. S. 7, 12 (1916).

11. See 2 TIFFANY, REAL PROPERTY (2d ed. 1920) § 464.

12. See 1 WILLISTON, SALES (2d ed. 1924) § 137.

13. UNIFORM SALES ACT § 5(3).

14. See RESTATEMENT, TRUSTS (1935) § 86(B); (1933) 21 CALIF. L. REV. 394.

There the contrary result was reached on the ground that the law will not do indirectly what it cannot do directly.¹⁵ Such an objection arises chiefly from the use of the term "contract to assign," which creates the misconception that the invalid assignment is actually being enforced. This confusion can be avoided by changing the description to conform more closely to the facts. What a court actually does in employing this device is to create and enforce a "contract to pay over" the property when received.¹⁶ There is no "contract to assign" the right to receive the property, for, once a fund is in the hands of the beneficiary, the right to receive it is extinguished and can no longer, strictly speaking, be "assigned." The difference, to be sure, is purely terminological, but the change in nomenclature reveals that the court is merely allowing the *cestui* to do what he always had the power to do, that is, to deal with the property as he sees fit once it is released from the trust.

The legendary justification of the spendthrift trust is found in the doctrine, *cujus est dare, ejus est disponere*,¹⁷ but the degree to which courts will limit or extend that maxim is essentially a matter of policy. There seems to be no valid reason why it should be invoked to prevent the *cestui* from contracting to pay over money which he shall have received at a later date. So long as the *res* itself is kept inviolate in the hands of the trustee and the status of the beneficiary's title remains unaltered, there is sufficient deference to the dead hand. Clearly the *cestui* should not receive personal immunity by virtue of the *in rem* restraint. To give effect to the assignment as a contract to pay over is simply to place the assignee in the position of a contract creditor on a par with any other creditors of the assignor, who can have judgment against all assets over which the beneficiary has unrestrained control.¹⁸ No creditor can touch the funds while they are still in the hands of the trustee, nor can he attach the trustee's check before the debtor has converted it to cash.¹⁹ The check will enable the beneficiary to buy the necessities which

15. *Bixby v. St. Louis Union Trust Co.*, 323 Mo. 1014, 22 S. W. (2d) 813 (1929). But cf. *Bursch v. Bursch*, N. Y. L. J., Feb. 13, 1930, p. 2426, col. 3, where a municipal court of New York City upheld the assignment of an interest in a spendthrift trust by employing the contractual fiction. Apparently, no other court has ever adopted this reasoning. Despite the lack of authority, however, the rule is advocated by the American Law Institute. See RESTATEMENT, TRUSTS (1935) § 152(K). It has also been urged by scholars in the field. See GRISWOLD, SPENDTHRIFT TRUSTS (1936) § 372; Scott, *Necessitous Circumvention of Spendthrift Trusts* (1932) 6 TEMP. L. Q. 503, 513.

16. In drafting an agreement of the nature of the property settlement in the principal case, use of the term "contract to pay over" would seem the most likely means of assuring a result similar to that reached in the principal case.

17. This theory of freedom of testate disposition was chosen by Mr. Justice Miller as the basis of his famous decision which established the validity of the spendthrift trust. *Nichols v. Eaton*, 91 U. S. 716 (1875).

18. All courts are agreed that once the trust money comes into the beneficiary's hands, it is subject to execution just as are his other assets. 1 BOGERT, TRUSTS AND TRUSTEES (1935) § 222.

19. There is a broad split of authority on whether a creditor can levy on a check of which the debtor is payee. Those statutes and courts which allow him to do so base their reasoning on the fact that a levy upon the check is a levy upon the debt represented thereby. See Note (1926) 41 A. L. R. 1003. However, since a spendthrift trustee cannot be garnished, it follows his check cannot be attached.

courts hold beyond a creditor's grasp;²⁰ the remaining proceeds can, like all other assets, be reached by execution.²¹ If courts regard the assignment in this manner, a settlor can be assured that his beneficiary will never be a public charge, and yet the beneficiary will not be allowed to plead an unfair defense²² to contracts entered into for fair value.

This concept of fair value, however, suggests one serious pitfall presented by the contractual device: the danger that beneficiaries will be induced to sign away all future interests for a grossly inadequate immediate return. If an instrument were expressly drafted not as an assignment, but as a contract to pay over funds after they had been received,²³ a peppercorn given by the creditor would be enough to render the instrument enforceable at law. Despite the manifest hardships that might thus be perpetrated upon improvident *cestuis*, the law courts have refused to look behind the mere naked sufficiency of consideration. But when, as in the principal case, the words used are those of present assignment,²⁴ there is an opportunity for a court to exercise its equity powers, and thus assure the beneficiary of fair value. An "assignment" of the spendthrift's interest is invalid upon its face, and if it is to be given effect as a contract to pay over, the assignee should be forced to seek his remedy in an equitable action for reformation and appropriate relief.²⁵ Traditionally the courts of chancery have been equipped to look behind the mere legal sufficiency of consideration and insist on fair value.²⁶ Today the equity courts have exclusive dominion over assignment of ex-

20. See 1 SHINN, ATTACHMENT AND GARNISHMENT (1896) §64 *et seq.*; RUED, *Attachment, Garnishment and Executions* (1913) 10 AM. LAW AND PRO. 303, 405.

21. *McIntosh v. Aubrey*, 185 U. S. 122 (1902). For an argument that all proceeds of an exempt check should also be exempted see (1938) 47 YALE L. J. 1403.

22. The case for the spendthrift doctrine as a whole is seriously weakened by the occasional flagrant abuses perpetrated by dishonest *cestuis*. *E.g.*, *Kilroy v. Wood*, 42 Hun 636 (N. Y. Sup. Ct. 1886); *Congress Hotel Co. v. Martin*, 312 Ill. 318, 143 N. E. 838 (1924). The other strenuous argument advanced against the spendthrift trust is that it tends to develop a parasite class at the top of the social order. See the late Professor Gray's famous diatribe: GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY (2d ed. 1895) Preface viii-x. But *cf.* Costigan, *Those Protective Trusts Which are Miscalled "Spendthrift Trusts" Reexamined* (1934) 22 CALIF. L. REV. 471; Manning, *The Development of Restraints On Alienation Since Gray* (1935) 48 HARV. L. REV. 373.

23. See note 16, *supra*.

24. In the principal case, the court remedied the breach by awarding damages, and, in so doing, functioned as a court of law. *Kelly v. Kelly*, 79 P. (2d) 1059 (Cal. 1938). However, no argument was raised that the wife had procured the assignment for inadequate consideration. The property settlement had been found to be a fair one in previous litigation between the parties. *Kelly v. Kelly*, 129 Cal. App. 325, 18 P. (2d) 781 (1933).

25. It could be argued that this is not a proper ground for reformation, since the change in the instrument might be said to make it conform not, as is usually the case, to the intent of the parties, but to a legal theory which makes it enforceable. But this is a fruitless argument, since the only purpose in changing the agreement to make it meet legal requirements is to effectuate the aims of the parties.

26. See 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §1270 *et seq.*

pectancies in decedents' estates, and these are enforced when and if "adequate consideration" is found.²⁷ A like solution for the problem of attempted assignments of a *cestui's* interest in a spendthrift trust would protect the promisor against unconscionable bargains, while assuring the promisee of a fair return for whatever he had lost.

COMITY IN THE ADMINISTRATION OF TRUST ESTATES*

As part of a divorce settlement in an Ohio probate court, a husband formerly domiciled in that state established a trust fund for his children. The trustee was a resident of Massachusetts, the beneficiaries were residents of Ohio, and the funds consisted of an interest in a trust estate in Boston. Settlor provided that the trust instrument was to be construed and administered according to the laws of Massachusetts, but empowered the Ohio probate court to direct payments out of principal when necessary for the benefit of the children. Plaintiffs, Ohio attorneys, brought suit in the Ohio probate court, seeking compensation out of the trust fund for their services to the beneficiaries in setting up the trust. Settlor, his wife as guardian of the children, and the trustee appeared specially to contest the court's jurisdiction. On appeal, the trustee was permitted to withdraw his appearance, but the common pleas court nevertheless affirmed a judgment for the plaintiffs. The Miami County Court of Appeals, finding that the probate court had had jurisdiction of the subject-matter and the parties, and that the common pleas court had had jurisdiction on appeal, affirmed the award. Plaintiffs then filed an equitable bill in Massachusetts in an attempt to recover the amount of this judgment from the trust fund. It was held that the trust *res* situated in Massachusetts was subject to its jurisdiction alone; that the Ohio probate court had no jurisdiction over the trustee; and that there was no personal judgment against the beneficiaries, as the contingent interests of unborn remaindermen were not represented.¹ It was further stated that as the Ohio probate court did not appear to rest its decision on a construction of the trust deed, the instrument could be interpreted by the Massachusetts court, which did not find that the deed gave the Ohio tribunal authority to order distribution of the trust funds for attorneys' fees.

The essential issue in the Massachusetts proceedings was whether "full faith and credit" under the United States Constitution² must or should be given a judgment of the Ohio courts to be paid out of personal property physically situated in Massachusetts. In deciding such an issue, a primary concern is the jurisdiction of the foreign court over the subject-matter of the suit. The Ohio attorneys contended, with no apparent success, that a

27. See 2 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 953; Comment (1925) 25 COL. L. REV. 215.

*Harvey v. The Fiduciary Trust Co., 13 N. E. (2d) 299 (Mass. 1938).

1. *Ibid.*

2. U. S. CONST. Art. IV, § 1.

final judgment on jurisdiction over the subject-matter was *res judicata* under *American Surety Company v. Baldwin*,³ and recent United States Supreme Court decisions⁴ have since established that in certain situations at least jurisdiction over the subject-matter once litigated is not subject to collateral inquiry. But even if the jurisdictional findings of the Ohio courts were *res judicata*, Massachusetts would not necessarily be obliged to accord those findings "full faith and credit" under the Constitution. These recent holdings presumably would not preclude a state from challenging the jurisdiction of a sister court which had determined rights to property situated within the former state.⁵

Jurisdiction over the subject-matter in the administration of trusts is considered to be something more than the general authority over trusts conferred on probate courts by statute. The "situs" of the trust is a decisive factor in founding this jurisdiction.⁶ Having decided that "situs" is determined only by physical location of the *res* and domicile of the trustee,⁷ the Massachusetts court declared that since both these elements favored Massachusetts the trustee could not be held to account in any other state. The court, citing non-conflict cases,⁸ concluded that an Ohio probate court could not be given

3. 287 U. S. 156 (1932).

4. *Davis v. Davis*, 59 Sup. Ct. 3 (U. S. 1938); *Stoll v. Gottlieb*, 59 Sup. Ct. 134 (U. S. 1938); cf. *Princess Lida of Thurn and Taxis v. Thompson*, (1938) 59 Sup. Ct. 275 (U. S. 1939).

5. *American Surety Co. v. Baldwin*, *supra* note 3, held that questions of jurisdiction were not to be re-litigated in a federal court after being once adjudicated in a state court. The opportunity for an appeal in the state courts constituted due process, and federal jurisdiction failed on collateral attack for want of a federal question. In *Princess Lida v. Thompson*, *supra* note 4, the federal court lacked jurisdiction because a state court had already assumed substantial control over the trust fund. *Stoll v. Gottlieb*, *supra* note 4, decided that a federal court had the power to determine its own jurisdiction over the subject-matter and its paramount authority could not be collaterally attacked in a state court. Cf. *Des Moines Navigation & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552 (1887). *Davis v. Davis*, *supra* note 4, involved divorce proceedings and not an adjudication of rights to property located in another state. Cf. *Tuells v. Flint*, 283 Mass. 106, 186 N. E. 222 (1932).

Since the federal question in each of these cases was a dispute between a state court and a federal court, it is possible that the decisions have no bearing on constitutional questions of full faith and credit between two state courts.

6. In some states trusts may be administered in either an *in rem* proceeding for which the situs of the trust must be in the forum state or in an *in personam* proceeding, the court having jurisdiction over the person of the trustee and general statutory authority to adjudicate trust issues. *Swetland v. Swetland*, 105 N. J. Eq. 608, 149 Atl. 50 (Ch. 1930); *aff'd without opinion*, 107 N. J. Eq. 504, 153 Atl. 907 (1931).

7. This doctrine is well-established in Massachusetts, although none of the cases cited for the proposition support it as stated here. *Jenkins v. Lester*, 131 Mass. 355 (1881); *Sewall v. Wilmer*, 132 Mass. 131 (1881); *Codman v. Krell*, 152 Mass. 214, 25 N. E. 90 (1890); *Russell v. Joys*, 227 Mass. 263, 116 N. E. 549 (1917); *Greenough v. Osgood*, 235 Mass. 235, 126 N. E. 461 (1920).

8. For example, *United States v. Corrick*, 298 U. S. 435 (1936) (District Court has no power to enjoin Secretary of Agriculture); *Shaw v. Paine*, 12 Allen 293 (Mass. 1896) (parties cannot confer probate powers on court with no probate jurisdiction);

jurisdiction of the trust. More generally, however, factors other than the physical location of the *res* and the domicile of the trustee are considered by courts in determining the "situs" of a trust,⁹ and in this case Massachusetts and Ohio seem to have been at least equally interested in the factors of trust administration. The Massachusetts court admittedly had a substantial interest in the disposition of the trust *res*. It was physically located in Massachusetts,¹⁰ it was to be administered according to Massachusetts law, and the trustee was domiciled in that state.¹¹ Since the trustee had legal title to the property, Massachusetts was the permanent situs for lawful taxation, and for tax purposes the *res* could not and did not follow any person domiciled in Ohio.¹² Massachusetts would probably have had jurisdiction of original litigation unless its rights were deferred on grounds of comity to the intervening interests of a sister state. Yet Ohio was interested in the trust in that it was the former domicile of the settlor¹³ and the situs of the divorce and the divorce settlement.¹⁴ The Ohio probate court had jurisdiction of the wardship of the *cestuis*¹⁵ and was specifically granted by the trust instrument itself a

Harwood v. Tracy, 118 Mo. 631, 24 S. W. 214 (1893) (party cannot confer on legal incompetent power to appoint a trustee).

9. To determine where a trust is to be administered, consideration is given to the provisions of the instrument, the residence of the trustees, the residence of the beneficiaries, the location of the property, and the place where the business of the trust is to be carried on. RESTATEMENT, CONFLICT OF LAWS (1934) c. 297, comment d.

10. See Tuells v. Flint, 283 Mass. 106, 113, 186 N. E. 222, 225 (1932) (each state has full jurisdiction over its inhabitants and the property within its boundaries); Keeney v. Morse, 71 App. Div. 104, 107, 75 N. Y. Supp. 728, 730 (1st Dep't 1902).

11. See Weissman v. Banque De Bruxelles, 254 N. Y. 488, 492, 173 N. E. 835, 836 (1930); City Bank Farmers Trust Co. v. Whiteing, 136 Misc. 416, 419, 241 N. Y. Supp. 398, 401 (Sup. Ct. 1930); 2 BEALE, CONFLICT OF LAWS (1935) § 294.5; STORY, CONFLICT OF LAWS (Bigelow's 8th ed. 1883) § 388 at 550; Beale, *Living Trusts of Movables* (1932) 45 HARV. L. REV. 969, 972; Swabenland, *The Conflict of Laws in Administration of Express Trusts of Personal Property* (1936) 45 YALE L. J. 438, 441.

12. Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83 (1929); Lewis v. County of Chester, 60 Pa. 325 (1869). But domicile of a decedent is the seat for taxation of his intangibles. Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930).

13. See Liberty National Bank & Trust Co. v. New England Investors Shares, Inc., 25 F. (2d) 493, 495 (D. Mass. 1928); Farmers' & Mechanics' Savings Bank v. Brewer, 27 Conn. 600, 605 (1858); Swetland v. Swetland, 105 N. J. Eq. 608, 613, 149 Atl. 50, 52 (Ch. 1930), *aff'd without opinion*, 107 N. J. Eq. 504, 153 Atl. 907 (1931); Cary v. Carman, 116 Misc. 463, 470, 190 N. Y. Supp. 193, 197 (Sup. Ct. 1921); Lozier v. Lozier, 99 Ohio St. 254, 256, 124 N. E. 167 (1919); Dunham v. Crossland, 115 S. W. (2d) 742, 744 (Tex. Civ. App. 1938); Creighton, *Interstate and International Living Trusts* (1930) 50 TRUST COMPANIES 741.

14. Final payment of the divorce settlement is a final adjudication of rights, and the probate court's jurisdiction generally ceases. Clough v. Long, 8 Ohio App. 420 (1918).

15. The guardian was appointed by the Probate Court of Miami County. Record p. 119, Harvey v. The Fiduciary Trust Co., 13 N. E. (2d) 299 (Mass. 1938). See OHIO GEN. CODE ANN. (Page, 1937) §§ 10501-53(4), 10507-2; Schmidt v. Schmidt, 280 Mass. 216, 218, 182 N. E. 374, 375 (1932).

particular interest in its administration.¹⁶ Moreover, the issues were first litigated in Ohio,¹⁷ in a court which had authority to determine its own jurisdiction without setting forth on the record the facts and evidence upon which judgment is rendered.¹⁸ Under these circumstances the issue, in fact, would seem to be less a question of jurisdiction than of the propriety of a state's administering a trust in which it has a substantial but divided interest.¹⁹ The probate courts of both states had an interest which might be called jurisdiction over the "situs" of the trust,²⁰ physical situs of personal property²¹ and domicile of *inter vivos* trustees²² not being essential to found jurisdiction, and both had authority over fiduciaries.²³ When a state with a substantial but divided interest in the subject-matter of a suit assumes jurisdiction, sister states are prone to enforce that judgment²⁴ unless it is found to be in contravention of the public policy of the forum.²⁵ Thus the problem of "full faith

16. The trust instrument provided: "Said trustee and its successors shall make payments from principal of said trust fund . . . if and when such payments are authorized by order of the Probate Court of Miami County duly made and entered." The court was to appoint successor trustees unless the beneficiaries had reached legal age, and the trust was to continue as long after the beneficiaries' majority as the court deemed necessary.

17. An interesting question is presented as to whether the forum of the action is a factor to be considered by a court in its determination of what law governs. See *Keeney v. Morse*, 71 App. Div. 104, 108, 75 N. Y. Supp. 728, 731 (1st Dep't 1902); *Lozier v. Lozier*, 99 Ohio St. 254, 256, 124 N. E. 167 (1919).

18. The probate courts of Ohio are courts of record. OHIO GEN. CODE ANN. (Page, 1937) § 10501-53(13). See *State ex rel. Young v. Morrow*, 131 Ohio St. 265, 276, 2 N. E. (2d) 595, 599 (1936).

19. The RESTATEMENT, CONFLICT OF LAWS (1934) § 299 does not talk in terms of jurisdiction.

20. See 2 BEALE, *op. cit. supra* note 11, at §§ 296.1, 297.1, 297.2; RESTATEMENT, CONFLICT OF LAWS (1934) § 297; Beale, *Equitable Interests in Foreign Property* (1907) 20 HARV. L. REV. 382, 395; Beale, *loc. cit. supra* note 11; Comment (1919) 19 COL. L. REV. 486, 488. "One might well assume from reading the rules formulated by Beale and the American Law Institute for *inter vivos* trusts that a mere numerical preponderance of the factors in one state would cause the law of that state to govern." Swabland, *loc. cit. supra* note 11.

21. See *Henderson v. Usher*, 118 Fla. 688, 691, 160 So. 9, 10 (1935); *Lozier v. Lozier*, 99 Ohio St. 254, 256, 124 N. E. 167 (1919).

22. See *Chase v. Chase*, 2 Allen 101, 104 (Mass. 1861); *Reynolds v. Reynolds*, 208 N. C. 578, 627, 182 S. E. 341, 371 (1935).

23. OHIO GEN. CODE ANN. (Page, 1937) § 10501-53(13), *Unger v. Wolfe*, 134 Ohio St. 69, 15 N. E. (2d) 955 (1938); MASS. ANN. LAWS (1933) c. 215, §§ 6, 8, 39, see *James v. James*, 260 Mass. 19, 22, 156 N. E. 745, 747 (1927); *Ginzberg v. Wyman*, 272 Mass. 499, 500, 172 N. E. 614, 615 (1930).

24. See *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 354 (1913); *Rackemann v. Taylor*, 204 Mass. 394, 402, 90 N. E. 552, 556 (1910); *Harrison v. Commissioners of Corporations and Taxation*, 272 Mass. 422, 427, 430, 172 N. E. 605, 608, 609 (1930); *Rosenbaum v. Garrett*, 57 N. J. Eq. 186, 189, 41 Atl. 252, 253 (Ch. 1893); *cf. Tuells v. Flint*, 283 Mass. 106, 113, 186 N. E. 222, 225 (1932); *Keeney v. Morse*, 71 App. Div. 104, 108, 75 N. Y. Supp. 728, 731 (1st Dep't 1902); see STORY, CONFLICT OF LAWS (Bigelow's 8th ed. 1883) § 514(b) n at 732.

25. See *Dammert v. Osborn*, 140 N. Y. 30, 39, 35 N. E. 407, 409 (1893); *Dougherty v. Equitable Life Assurance Soc.*, 266 N. Y. 71, 102, 193 N. E. 897, 903 (1934); *City*

and credit" in the instant situation might well have been resolved in terms of comity rather than of jurisdiction. Such a distinction is not merely academic delineation, for if each state can found *sole* jurisdiction on the basis of its *divided* interest, litigation in trust suits would be a ceaseless activity.²⁶ Use of comity concepts would pragmatically result in much less conflict, for the limiting factors of "public morals" and "public policy" have at present little content.²⁷

Massachusetts perhaps refused recognition for the unstated reason that it considered an award of one-quarter of a trust fund to the attorneys who assisted in establishing it unconscionable and contrary to its public policy. But this specific problem was before the Ohio Court of Appeals;²⁸ the question was adjudicated there; and, after a review of the legal services performed, an order was affirmed on the authority of Ohio²⁹ and United States Supreme Court³⁰ decisions. Ohio and the federal courts, contrary to the rule prevailing in Massachusetts and some other states,³¹ permit attorneys who were not retained by the trustee or receiver³² to recover out of trust or receivership funds, or proportionately from those benefited by the litigation. While unconscionable judgments may well be valid grounds for refusing "full faith and credit" in conflict cases, it would seem that in this instance the courts of Ohio had adjudicated the propriety of the counsel fees and that comity dictated recognition and full faith.

The Massachusetts court also inquired into the jurisdiction of Ohio over the person of the trustee and the contingent interests of unborn remaindermen, although under conventional conflicts rules³³ a final judgment upon

Bank Farmers' Trust Co. v. Cheek, N. Y. L. J., June 7, 1935, p. 2941; RESTATEMENT, CONFLICT OF LAWS (1934) § 612.

26. See Rackemann v. Taylor, 204 Mass. 394, 398-401, 90 N. E. 552, 554-55 (1910).

27. See Fauntleroy v. Lum, 210 U. S. 230, 236 (1908); McKnett v. St. Louis & S. F. Ry., 292 U. S. 230, 233 (1934); Dammert v. Osborn, 140 N. Y. 30, 41, 35 N. E. 407, 410 (1893); RESTATEMENT, CONFLICT OF LAWS (1934) § 612 at 732; 2 BEALE, CONFLICT OF LAWS (1934) §§ 445.1, 446.1.

28. Sampson v. Mattern, 18 Ohio L. Abs. 693 (1935).

29. Trumpler v. Royer, 95 Ohio St. 194, 115 N. E. 1018 (1917); Koelble v. Runyan, 25 Ohio App. 426, 158 N. E. 279 (1927); Estate of Oskamp, 1 Ohio N. P. (N.S.) 197 (Prob. Ct. 1902); see 2 RESTATEMENT OF TRUSTS (1935) §§ 269, 270.

30. Trustees of Greenough, 105 U. S. 527 (1881); Central Railroad & Banking Co. v. Pettus, 113 U. S. 116 (1885); Harrison v. Perea, 168 U. S. 311 (1897).

31. MASS. ANN. LAWS (1933) c. 215, §§ 39, 45; Mulloney v. Barnes, 266 Mass. 50, 164 N. E. 917 (1929); Conley v. Fenelon, 266 Mass. 340, 165 N. E. 382 (1929); N. Y. Surr. Ct. Act § 231a, Matter of Chaves, 143 Misc. 872, 257 N. Y. Supp. 645 (Surr. Ct. 1932) (primary and exclusive intention of statute was to fix payments rendered to representatives rather than for services rendered individual beneficiaries).

32. A guardian has the right to employ counsel or incur other expenses in the interest of a ward's estate, and in some jurisdictions such services are a proper credit against the estate. Taylor v. Bemiss, 110 U. S. 42 (1883); Kingsbury v. Powers, 131 Ill. 182, 22 N. E. 479 (1889); Commonwealth *ex rel.* Flowers v. Flowers, 326 Pa. 138, 191 Atl. 914 (1937); see Harris' Appeal, 323 Pa. 124, 131, 186 Atl. 92, 96 (1936); *cf.* Payne v. Rech, 6 Ohio App. 327 (1917).

33. RESTATEMENT, CONFLICT OF LAWS (1934) § 451.

jurisdiction over the person³⁴ is *res judicata*.³⁵ The inquiry as to the trustee turned on a withdrawal of his special appearance³⁶ after an appeal to the common pleas court. The privilege of a defendant to withdraw after a court has adversely adjudicated jurisdiction over his person is in dispute; but many courts, including those of Massachusetts, have held that a plaintiff's rights may not be prejudiced by such withdrawal, and that a judgment in his favor may none-the-less be entered.³⁷ Furthermore, the Ohio Court of Appeals specifically found that the common pleas court had had jurisdiction on appeal.³⁸ It appears that the trustee, on a voluntary appearance, had had his jurisdictional rights determinatively adjudicated and was bound by the decision.³⁹ Massachusetts also asserted that no personal judgment could run against the beneficiaries since in the Ohio proceedings no guardian *ad litem* was appointed to represent the contingent interests of unborn remaindermen. But there is a conflict of authority whether even *cestuis* are necessary parties to a suit against a trustee when their interests are not adverse to those of the trustee,⁴⁰ and it is less reasonable to hold that remote contingent interests

34. Support can be marshalled for the argument that personal property follows the person so that if the court has jurisdiction over the parties, it has jurisdiction over the subject-matter and can enforce a trust or any other equity. See 1 PERRY, TRUSTS (7th ed. 1929) § 70 at 54.

35. See *Stone Leather Co. v. Henry Boston & Sons*, 234 Mass. 477, 478, 126 N. E. 46 (1920); *Hall v. Wilder Mfg. Co.*, 316 Mo. 812, 826, 293 S.W. 760, 766 (1927); *Waters v. Spencer*, 44 Misc. 15, 18, 89 N. Y. Supp. 693, 695 (Sup. Ct. 1904).

36. It is not clear whether there was a withdrawal of appearance at all, but if there was it was withdrawn on application of counsel for the guardian and minors and not by the Fiduciary Trust Co. See Record, p. 99, *Harvey v. The Fiduciary Trust Co.*, 13 N. E. (2d) 299 (Mass. 1938). The Massachusetts Court, however, did not consider the point.

37. *United States v. Curry*, 6 How. 106 (U. S. 1848); *Garber v. Greenberg*, 225 Mass. 422, 114 N. E. 670 (1917); *Cooley v. Lawrence*, 12 How. Pr. 176, 184, 12 N. Y. Super. Ct. (5 Duer) 605, 610 (1855); *White v. Thompson*, 3 Ore. 115 (1859); *Ball v. New York Life Ins. Co.*, 3 Tenn. App. 102 (1926); *Phillips v. The Maccabees*, 50 S. W. (2d) 478 (Tex. Civ. App. 1932); *United States F. & G. Co. v. Nash*, 20 Wyo. 65, 124 Pac. 269 (1912), *denying rehearing of* 121 Pac. 541 (1912); *cf. Rio Grande Irrigation & Colonization Co. v. Gildersleeve*, 174 U. S. 603 (1899) (party may not withdraw without leave of court); *First National Bank of Danville v. Cunningham*, 43 Fed. 510 (C. C. D. Ky. 1891) (may withdraw before adverse action on motion to vacate); *Whitehead v. Post*, 2 Ohio Dec. (Reprints) 468 (1861) (appearance "improvidently entered" may be withdrawn on leave of court); see *Graham v. Spencer*, 14 Fed. 603, 603 (C. C. D. Mass. 1882) ("it is plain no question of personal jurisdiction was intended to be submitted").

38. See note 28, *supra*.

39. In Ohio a motion to dismiss for want of jurisdiction over the subject matter operates as a general entry of appearance. See *Klein v. Lust*, 110 Ohio St. 197, 205, 143 N. E. 527, 529 (1924); *State ex rel. Bennett v. Industrial Commission*, 50 Ohio App. 269, 270, 198 N. E. 56, 57 (1935); *Chicago Life Insurance Co. v. Cherry*, 244 U. S. 25, 29 (1917).

40. Compare *Talbutt v. Security Trust Co.*, 22 F. Supp. 241 (E. D. Ky. 1933); *Braley v. Spragins*, 221 Ala. 150, 128 So. 149 (1930); *Lee v. Silva*, 197 Cal. 364, 240 Pac. 1015 (1925); *Madden v. Madden*, 279 Mass. 417, 181 N. E. 771 (1932); *Hood v. Cannon*, 178 S. C. 94, 182 S. E. 306 (1935) with *Vetterlein v. Barnes*, 124 U. S. 169

must be represented.⁴¹ Massachusetts, for example, has not been so rigid in its requirements heretofore, but has considered the problem to be one of judicial discretion.⁴²

Eliminating, for purposes of discussion, all questions of jurisdiction, a trust instrument providing for administration by the courts of two states raises interesting questions of comity. On the few occasions in which two states have been designated,⁴³ the settlor's intentions have apparently controlled,⁴⁴ and although the courts of one state may be reluctant to administer a trust in common with the courts of a sister state,⁴⁵ administration by two states has at times been necessary. To illustrate, a will probated in the domicile state may provide for the administration of a charitable trust in another jurisdiction. The domicile state will then construe the will according to its laws, collect the assets, and pay them over to the sister state for administration under the foreign law.⁴⁶ A trust consisting of real property situated in two

(1888); *Noel v. Noel*, 195 Atl. 315 (Md. 1937); *Sweet v. Parker*, 22 N. J. Eq. 453 (Ch. 1871); *Colorado & Southern Ry. v. Blair*, 214 N. Y. 497, 108 N. E. 840 (1915); *Jackson v. Talmadge*, 246 N. Y. 133, 158 N. E. 48 (1927). See 1 FREEMAN, JUDGMENTS (5th ed. 1925) § 500 at 1074.

41. See *Talbutt v. Security Trust Co.*, 22 F. Supp. 241 (E. D. Ky. 1938); *Shirk v. Walker*, 10 N. E. (2d) 192, 199 (Mass. 1937).

42. See *Wickwire Spencer Steel Corp. v. United Spring Mfg. Co.*, 247 Mass. 565, 569, 142 N. E. 758, 759 (1924).

43. In the more typical situation, the settlor expresses no intent as to what state law and procedure he desires to govern the administration of the trust. Courts have then directed their efforts toward ascertaining that intent with a view to making it effective. See *Gillette v. Stewart*, 108 Conn. 611, 617, 144 Atl. 461, 463 (1929); *Russell v. Joys*, 227 Mass. 263, 267, 116 N. E. 549, 550 (1917); *In re Vanneck's Will*, 158 Misc. 704, 706, 286 N. Y. Supp. 489, 491 (Surr. Ct. 1936); *Lanius v. Fletcher*, 100 Tex. 550, 553, 101 S. W. 1076, 1077 (1907); *In re Risher's Will*, 277 N. W. 160, 162 (Wis. 1938).

Where intentions have been expressed, courts have been diligent in carrying them out, provided the settlor's wishes do not contravene the state's public policy. See *Liberty National Bank v. New England Investors' Shares, Inc.*, 25 F. (2d) 493, 495 (D. Mass. 1928); *In re Estate of Beckwith v. Cooper*, 258 Ill. App. 411, 417 (1930); *Shannon v. Irving Trust Co.*, 275 N. Y. 95, 102, 9 N. E. (2d) 792, 794 (1937); *In re McAuliff's Estate*, 4 N. Y. S. (2d) 605, 607 (Surr. Ct. 1938); *In re Chappell's Estate*, 124 Wash. 128, 132, 213 Pac. 684, 685 (1923); *RESTATEMENT, CONFLICT OF LAWS* (1934) § 297; *Beale, Trusts Inter Vivos and the Conflict of Laws* (1930) 44 HARV. L. REV. 161, 163; *Comment* (1929) 39 YALE L. J. 100, 107; (1938) 6 DUKE B. A. J. 37.

44. *Shannon v. Irving Trust Co.*, 275 N. Y. 95, 9 N. E. (2d) 792 (1937).

45. See *Jenkins v. Lester*, 131 Mass. 355, 357 (1881); *Harrison v. Comm. of Corporations and Taxation*, 272 Mass. 422, 427, 428, 172 N. E. 605, 608, 609 (1930); *Schwartz v. Gerhardt*, 44 Ore. 425, 427, 75 Pac. 698, 699 (1904); *RESTATEMENT, CONFLICT OF LAWS* (1934) § 299; 2 *BEALE, CONFLICT OF LAWS* (1935) § 299.1. But see *Henderson v. Usher*, 118 Fla. 688, 694, 160 So. 9, 11 (1935); *Rosenbaum v. Garrett*, 57 N. J. Eq. 186, 188, 41 Atl. 252, 253 (1898); *Davis v. Davis*, 57 N. J. Eq. 252, 255, 41 Atl. 353, 354-55 (Ch. 1898); *Farmers' Loan & Trust Co. v. Ferris*, 67 App. Div. 1, 5, 73 N. Y. Supp. 475, 477-78 (1st Dep't 1901); *DICEY, CONFLICT OF LAWS* (5th ed. 1932) 968-971; *STORY, CONFLICT OF LAWS* (Bigelow's 8th ed. 1883) § 514 (b) n.

46. *Chamberlain v. Chamberlain*, 43 N. Y. 424 (1871); *Hollis v. Drew Theological Seminary*, 95 N. Y. 165 (1884); *Hope v. Brewer*, 136 N. Y. 126, 32 N. E. 558 (1892); *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. 407 (1893); see *DICEY, CONFLICT OF LAWS*

states will likewise be administered under the laws of each.⁴⁷ There is apparently neither law nor judicial pronouncement which forbids bilateral administration,⁴⁸ and it is difficult to see wherein any concept of public policy is contravened by it. On the contrary, it would seem, as in the instant case, that comity would militate strongly in favor of recognition of sister state judgments in the administration of specific phases of a trust estate.

PROBLEMS OF ANTI-TRUST PROSECUTION: THE ALCOA SUIT*

IN THE popular mind, "monopoly" is best exemplified by the Aluminum Company of America. The notoriously complete control which this company enjoys over the production of virgin aluminum¹ in America would seem at a glance to place it indisputably within the proscription of any monopoly or attempt to monopolize in Section 2 of the Sherman Act.² Nevertheless, the obvious inference that the Anti-Trust Division of the Department of Justice has selected an easy victim in attacking the Company under this Act³ is dissipated by a more penetrating scrutiny. The path of prosecution is lined with successive pitfalls, some created by facts peculiar to the present suit, others left by the courts in deciding past anti-trust cases.

The first problem encountered surrounded the framing of the petition. Precedent indicates that the successful formula includes allegations as to predatory practices,⁴ manipulation of prices⁵ and growth by abnormal means.⁶

(5th ed. 1932) 205; Beale, *Equitable Interests in Foreign Property* (1907) 20 HARV. L. REV. 382, 395.

47. *Ricketson v. Merrill*, 148 Mass. 76, 19 N. E. 11 (1883); *Beardsley v. Hall*, 291 Mass. 411, 197 N. E. 35 (1935); see RESTATEMENT, CONFLICT OF LAWS (1934) § 243.

48. See *Shannon v. Irving Trust Co.*, 275 N. Y. 95, 102, 9 N. E. (2d) 792, 794 (1937); STORY, CONFLICT OF LAWS (Bigelow's 8th ed. 1883) § 514 (b) n.

* *United States v. Aluminum Company of America*, Equity No. 85-73 (S. D. N. Y. petition filed April 23, 1937).

1. See WALLACE, MARKET CONTROL IN THE ALUMINUM INDUSTRY (1937); LAIBLER, CONCENTRATION OF CONTROL IN AMERICAN INDUSTRY (1931) 74, 293-298; Wechsler, *United States v. Alcoa* (1938) 147 NATION 346.

2. 26 STAT. 209 (1890), 15 U. S. C. § 2 (1934).

3. *United States v. Aluminum Company of America*, Equity No. 85-73 (S. D. N. Y. petition filed April 23, 1937); see N. Y. Times, April 24, 1937, p. 1, col. 1.

4. *Standard Oil Co. v. United States*, 221 U. S. 1 (1911); *United States v. Patterson*, 201 Fed. 697 (S. D. Ohio 1912); see *United States v. Swift & Co.*, 286 U. S. 105, 118 (1932); cf. *United States v. United States Steel Corp.*, 251 U. S. 417 (1920). See Handler, *Industrial Mergers and the Anti-Trust Laws* (1932) 32 COL. L. REV. 179, 245 *et seq.*

5. *Standard Oil Co. v. United States*, 221 U. S. 1 (1911); *American Biscuit Co. v. Klotz*, 44 Fed. 721 (E. D. La. 1891); see *United States v. Swift & Co.*, 286 U. S. 106, 116 (1932).

6. *United States v. Southern Pacific Co.*, 259 U. S. 214 (1922); *United States v. American Tobacco Co.*, 221 U. S. 106 (1911); see *Standard Oil Co. v. United States*, 221 U. S. 1, 75 (1911).

Although these charges are made,⁷ the Government regards them as but precautionary formalities.⁸ Their proof has been rendered virtually impossible by the reported dramatic disappearance of Senator Walsh's comprehensive anti-Alcoa library⁹ shortly before suit was instituted and by the fact that the Company's most flagrant misconduct occurred during the years preceding the past decade.¹⁰ Suspecting that the court may find the stain of past misdeeds eradicated by present apparently good behavior,¹¹ the Department of Justice is relying chiefly on the argument that, regardless of how achieved, a complete monopoly in a field which would ordinarily be competitive violates the Sherman Act.¹² The existence of such a monopoly is sought to be established under allegations that the Aluminum Company produces 100% of the virgin aluminum manufactured in the United States; that it has achieved this position through control of over 90% of the American bauxite deposits and most of the available waterpower sites; and that its control extends to 50-60% of manufactured aluminum goods.¹³ But despite these highly favorable facts, other impediments appear which may prevent the vital question of 100% monopoly from squarely confronting the court. By emphasizing the competition afforded by the production of secondary aluminum, the importation of virgin aluminum and the substitution of other metals, the court can deliberately evade the issue, albeit on tenuous grounds.¹⁴ Or, even should the Government succeed in establishing the existence of monopoly, it may find that it cannot overcome the judicial disfavor engendered by the delay

7. Petition of the Government, p. 42 *et seq.*, United States v. Aluminum Co. of America, Equity No. 85-73 (S. D. N. Y. 1937).

8. Brief for United States on Meaning of Sherman Act (filed Sept. 21, 1938) p. 8, United States v. Aluminum Co. of America, Equity No. 85-73 (S. D. N. Y. 1937).

9. See Wechsler, *supra* note 1.

10. See Comment (1937) 37 COL. L. REV. 269; Wechsler, *supra* note 1. Whatever suspicion the Corporation's unusually stable prices may have occasioned since then, no fault was found when its tactics were subjected to judicial scrutiny in 1935. Baush Machine Tool Co. v. Aluminum Co. of America, 79 F. (2d) 217 (C. C. A. 2d, 1935). Any support to be derived from that suit rests in the somewhat equivocal inference to be drawn from Alcoa's settlement with the Baush Co. despite a favorable decision. See N. Y. Times, Dec. 1, 1935, § III, p. 10, col. 1.

11. Cf. United States v. United States Steel Corp., 251 U. S. 417 (1920); United States v. International Harvester Co., 274 U. S. 693 (1927); United States v. American Can Co., 230 Fed. 859 (D. Md. 1916).

12. See Brief for United States, *supra* note 8, at p. 8.

13. Petition of the Government, *supra* note 7, p. 17 *et seq.*, see 3 FEDERAL TRADE COMMISSION, REPORT ON HOUSE FURNISHINGS INDUSTRIES (1925) 64; LAIDLER, *loc. cit. supra* note 1.

14. Recognition of the facts renders this position untenable. Aluminum imports to others than Alcoa during 1924 to 1933 were only from four to nine per cent of the total annual supplies. See N. R. A. REPORT, ALUMINUM INDUSTRY (1934) 19. There are important differences, furthermore, between primary and secondary aluminum with respect to weight, purity, brittleness, tensile strength, etc., which substantially impair use of secondary aluminum as a substitute. Because of its lightness, aluminum is replaceable only rarely by other metals. See ANDERSON, THE METALLURGY OF ALUMINUM AND ALUMINUM ALLOYS (1925) 475. For the importance of the distinction between virgin aluminum and related metals, cf. Standard Oil Co. of Indiana v. United States, 283 U. S. 163 (1931).

in bringing suit. In the past courts have viewed disapprovingly the contrast between the ordinarily lengthy period during which a merger would flourish unattacked and the promptness exhibited in prosecuting a loose combination.¹⁵ The present suit is the second governmental attempt to police the aluminum industry, the first having resulted in a consent decree in 1912.¹⁶ By suffering the Aluminum Company to expand unmolested since that time, the Department has invited the difficulty of explaining the twenty-five year interval between prosecutions in an industry which has undergone no substantial changes in the interim.¹⁷

Even if all these barriers are crossed successfully, the Government cannot but approach the framing of its legal argument with misgivings. Although loose combinations have often been dissolved,¹⁸ the courts have sanctioned wide freedom for so-called "naturally growing" corporations.¹⁹ Thus the Department is faced with the necessity of overcoming the judicial discrimination in favor of growth by merger,²⁰ a task for which the existing case law on the subject provides little help. Anti-trust cases do not exemplify the cumulative development of a law through progressive judicial interpretation; the widely divergent decisions at best present to a court a body of ex-

15. In five cases involving growth by fusion the time from the inception of the combination to the bringing of suit has been from ten to thirteen years. In six cases of loose combination, the time was between one and two years, except in two cases, of six and eight years, respectively. See Hardy, *Loose and Consolidated Combinations under the Anti Trust Laws* (1933) 21 GEO. L. J. 123.

16. *United States v. Aluminum Co. of America* (W. D. Pa. 1912), DECREE & JUDGMENTS IN FEDERAL ANTITRUST CASES (1918) 341. This decree, which was limited to the proscription of certain contracts, was resurrected by the Aluminum Company to provide the basis for an injunction against the present proceedings under the doctrine of *res judicata*. *Aluminum Co. of America v. United States*, 19 F. Supp. 374 (W. D. Pa. 1937). The injunction was dissolved by a special expediting court formed under § 1 of the Expediting Act, 36 STAT. 854, 1157 (1910), 15 U. S. C. § 28 (1934). *United States v. Aluminum Co. of America*, 20 F. Supp. 608 (W. D. Pa. 1937), *aff'd*, 302 U. S. 230 (1937); see Comment (1938) 38 COL. L. REV. 515. Although it might have been contended that the Government had an adequate remedy in supplementary proceedings under the old decree, this argument would probably not be sustained in view of the implicit recognition by the court that the problems provoking the present suit differed too greatly from those in the earlier litigation to fall within the ambit of such supplementary proceedings. The significance of the question lies in its effect on the Government's choice of forum.

17. By 1912 the last of the basic patents protecting the monopoly had expired and Alcoa remained in possession of the industry purely by virtue of its size and control of bauxite. Competing invaders were regularly bought or squeezed out and the history of the industry was essentially that of a single organization's continued growth. See note 1, *supra*.

18. *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U. S. 600 (1914); *American Column and Lumber Co. v. United States*, 257 U. S. 377 (1921); *United States v. American Linseed Oil Co.*, 262 U. S. 371 (1923); see Hardy, *supra* note 15.

19. *United States v. United States Steel Corp.*, 251 U. S. 417 (1920); *cf.* *United States v. Southern Pacific Co.*, 259 U. S. 214 (1922); *United States v. Eastman Kodak Co.*, 226 Fed. 62 (W. D. N. Y. 1915); see *Standard Oil Co. v. United States*, 221 U. S. 1, 75 (1911); *Handler, loc. cit. supra* note 4.

20. See Hardy, *supra* note 15.

perience gathered in applying a statute to varying factual situations.²¹ An attempt, therefore, to marshal precedent into an argument that will impel the court inexorably to one conclusion in a particular case may ultimately result in unwitting demonstration that the existing law permits a decision either way on a given set of facts. Flatly contradictory dicta are available. Thus, the same court which has said, "The law does not make mere size . . . or the existence of unexercised power an offense,"²² said in the same year, "That such a power . . . regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act, has been frequently held by this court."²³ To attempt to reconcile such broad statements as these by the purely mechanical process of distinguishing their factual bases seems wholly futile in view of their universal applicability. The Department of Justice is left, then, with two hardly desirable alternatives: if it attempts to draw favorable generalizations from the entire body of anti-trust law, it is met with a confusing welter of antithetical dicta from which unfavorable generalizations are equally available; if, on the other hand, it narrows its argument to a process of distinguishing and matching factual situations, it merely draws to the attention of the courts their power to distinguish the instant case in like manner from favorable precedents.

It becomes apparent, then, that the Government must rely less on a legalistic approach than on an economic argument. This is in itself no disadvantage, for, although anti-trust opinions have been couched in legal doctrines, sporadic dicta reveal that behind this phraseology lies recognition that the problem is essentially economic.²⁴ In adopting this approach, however, the Supreme Court has constantly identified large corporations with economy of production.²⁵ Accordingly, the achievement of vertical integration or the organization of a unit whose size would enable it to enter foreign trade have been deemed desirable enough to justify incidental suffocation of competition.²⁶ Nor has the judicial eye seen any other public interest which would require withholding the rewards of industrial efficiency by curtailing normal growth.²⁷ Before the Anti-Trust Division can prevail, therefore, it must persuade the courts to modify these beliefs in the light of more recent economic views. The theory that increase in size is always paralleled by increase

21. See *Maple Flooring Manufacturers Assn. v. United States*, 268 U. S. 563, 579 (1925); *Sugar Institute, Inc. v. United States*, 297 U. S. 553, 600 (1936).

22. See *United States v. United States Steel Corp.*, 251 U. S. 417, 451 (1920).

23. See *United States v. Reading Co.*, 253 U. S. 26, 57 (1920).

24. See *Maple Flooring Manufacturers Assn. v. United States*, 268 U. S. 563, 583 (1925); *United States v. United States Steel Corp.*, 251 U. S. 417, 438 (1920); *United States v. Terminal Railroad Assn. of St. Louis*, 224 U. S. 383, 410 (1912). For a frank treatment of antitrust problems on an economic basis, see *Sugar Institute, Inc. v. United States*, 297 U. S. 553 (1936).

25. See *United States v. United States Steel Corp.*, 251 U. S. 417, 438 (1920); *United States v. Winslow*, 227 U. S. 202, 217 (1913).

26. See *United States v. United States Steel Corp.*, 251 U. S. 417, 442, 445 (1920); *United States v. Winslow*, 227 U. S. 202, 218 (1913).

27. But this view seems to be confined to cases arising under the Sherman Act. Cf. *Liggett Co. v. Lee*, 288 U. S. 517 (1933), where, although taxation tending to drive out chain stores was approved only in part, the majority and especially the two minority opinions show a lively awareness of the social harm that might accompany the economic efficiency of the chains.

in efficiency has been qualified by the view that there is an optimum unit for each industry beyond which efficiency gives way to unwieldiness.²⁸ Nor can vertical integration, though often augmenting efficiency, be designated categorically as a commendable objective. Its economies may not be available to an industry whose stages of production are as simple as, for example, those of the Aluminum Company.²⁹ The benefits of giantism, moreover, become obscured by the burdensome capital structure which is necessitated by monopolistic control of resources not fully exploited.³⁰ Such circumstances give rise to the presumption that a monopoly must take advantage of its position in order to earn a "reasonable profit on an unreasonable capitalization."³¹

Even though the Supreme Court, as at present constituted, might perhaps be receptive to these arguments,³² the high bench as well as the district judge will be the less likely to favor the Government because of the even more vexing problem of providing a practicable remedy. Before the courts will plunge into the complexity of dissolution, they must have some assurance that a plan can be devised which will offset the consequences which they envision as attending the disruption of delicately coordinated industrial machinery.³³ In the *Standard Oil* case,³⁴ for example, the Supreme Court did

28. See ELY, *OUTLINES OF ECONOMICS* (5th ed. 1932) 548; SLICHTER, *MODERN ECONOMIC SOCIETY* (1931) 134. For some indication that Alcoa has exceeded the optimum point in its development, see WALLACE, *MARKET CONTROL IN THE ALUMINUM INDUSTRY* (1937) Ch. IX.

29. Whether or not vertical integration is economical to the corporation attempting it, it is often productive of evil effects on the rest of the industry. Where outsiders are dependent on the parent corporation for necessary raw materials, it is impossible to prevent discrimination in favor of a competing subsidiary, for costs are easily concealed in the maze of accounting systems. Typical of this situation is the relationship enjoyed between the Aluminum Goods Co., which manufactures kitchenware, and the Alcoa reducing plants, which produce sheet aluminum. See HANDLER, *THE FEDERAL ANTI-TRUST LAWS—COLUMBIA SYMPOSIUM* (1932) 150 *et seq.*; Wechsler, *supra* note 1.

30. See HANDLER, *op. cit. supra* note 29, at 148. Alcoa, for example, is said to control many unused waterpower sites by leases which necessitate annual payments; these sites, appearing in its balance sheet as assets, provide the basis for a corresponding expansion of the capital structure. See Wechsler, *supra* note 1; WALLACE, *op. cit. supra* note 28, at p. 137 *et seq.*

31. Ordinarily this is done by maintaining the price level at the expense of production volume. Statistics seem to indicate that Alcoa again exemplifies monopoly technique. According to the *STATISTICAL ABSTRACT* (1935) 673, the yearly average price of aluminum in New York during the depression was: 1928—23.90 (cents per pound); 1930—23.79; 1932—23.30; 1934—21.58. Production dropped in 1930 one-third below the figure for 1929, and one-third below that in 1931. See *The Aluminum Company of America* (Nov. 1932) *FORTUNE* 20.

32. *Cf. United States v. Swift & Co.*, 286 U. S. 106 (1932). In previous antitrust prosecutions the score in favor of the government has been: *McReynolds*, 12-3; *Hughes*, 6-2; *Brandeis*, 8-6; *Roberts*, 5-3; *Stone*, 6-5; *Butler*, 7-8. *Reed, Black and Frankfurter, JJ.*, have not yet given official voice to their leanings.

33. *Cf. United States v. American Can Co.*, 230 Fed. 859 (D. Md. 1916); *United States v. Great Lakes Towing Co.*, 208 Fed. 733 (N. D. Ohio 1913), 217 Fed. 656 (N. D. Ohio 1914), *appeal dismissed*, 245 U. S. 675 (1917). The notorious discrimination between loose combinations and mergers is doubtless attributable in large measure to the relative simplicity of dissolving the former. See Hardy, *supra* note 15.

34. *Standard Oil Co. v. United States*, 221 U. S. 1 (1911).

not hesitate to tear down the petroleum empire, for natural lines of cleavage were clearly marked by the company's internal organization: the key lay in the destruction of the parent holding company. Since the subsidiaries were essentially distributing corporations organized on a territorial basis, their separation into independent units split up the industry sufficiently to allow the eventual revival of competition.³⁵ The solution in the Aluminum Company's case is not nearly so simple; yet its key, too, is suggested in the basis of the monopoly. If the Company were unable to control the source of bauxite and the cheap water power sites, it could not maintain its monopoly without exploiting the dominant position gained through its 100% control of the smelting process. The power to do this might be reduced beyond the possibility of abuse by placing the various reduction plants in which virgin aluminum is produced under the control of separate corporations. So skeletal an outline, however, fails to reveal the economic and administrative complexities which beset an attempt at such a reorganization. If a systematic approach is taken, the Government must decide whether the common denominator which it seeks for the industry should be the most efficient producing unit or the unit which gives most assurance of the revival of competition, for the two are by no means coextensive.³⁶ Having assumed one position, it must then engage in the uncertain process of determining the size of the desired unit and grapple with the more difficult problem of impressing that plan upon the existing physical organization of the industry. Should the Government, on the other hand, abandon the confused realm of economic theory in favor of a haphazard rearrangement, the tribunal may well withhold approval lest the failure of the scheme leave the court responsible for the collapse of a hitherto profitable industry. Whatever the plan for dissolution, the technique for dividing the property interests will occasion further worry. Since the corporation is not a series of integrated concerns, but a unified whole, the solution does not lie simply in trading shares of stock, as in the *Standard Oil* case. The resulting units will be heterogeneous: some will be mining corporations, others reducing plants, and so forth.³⁷ The seemingly unattainable goal will have to be a scheme which will combine both fairness and feasibility in apportioning assets whose dissimilarity implies varying earning capacity.

For the Court to be sidetracked by these practical difficulties would indeed be unfortunate from the Government's point of view; the issue of monopoly *per se* could hardly be more sharply defined than by the facts of this case. By seizing the opportunity to decide that basic question in unequivocal words,

35. But even under such highly favorable conditions, external stimuli were necessary. See (1938) 48 YALE L. J. 332, 336ff.

36. See HANDLER, *op. cit. supra* note 29, at 149.

37. Alcoa consists at present of the American Bauxite Co., which mines virtually all United States bauxite; The Aluminum Ore Co., which produces all alumina used in making the pure aluminum; four smelting plants; and eight finished goods companies. No plan for dissolution could be effective, of course, unless the first two companies were broken up in addition to the destruction of the vertical integration. A further difficulty lies in the fact that the corporation is privately owned, the stock being largely held between eight estates or individuals. Unless they were made to dispose of their holdings, any dissolution would be purely nominal. See LAIDLER, *loc. cit. supra* note 1.

the Court could definitely indicate the future course of anti-trust law enforcement. A judgment in favor of the Aluminum Company so grounded would signify not only adherence to the Court's first faith in "bigness," but also unqualified repudiation of the Sherman Act as applied to growth by merger and internal investment. But the Department obviously hopes for a broadly and generally phrased decision for the Government. By suggesting the extent to which "natural growth" would be curbed, the case would create substantive basis for a gradual extension of the prohibition to corporations which, although incomplete monopolies and not apparently guilty of sharp practices, nevertheless dominate their industries sufficiently to forestall more efficient, if less profitable, organization. Whichever side the court may choose, however, circumstances render it probable that the conclusion will reflect a less well defined position. In deciding for the Government, the Court could easily achieve a compromise by couching its opinion in cautious language and emphasizing the unique factual basis of 100% monopoly. Such a decision would offer no contribution to the meaning of the Act other than its extension to another relatively rare situation. The attainment of their immediate objective by such means would provide scant consolation to the Anti-Trust Division for the loss of an unrivalled opportunity to delineate the hitherto uncertain boundaries within which the Act will be applied. On the other hand, dismay at the near impossibility of framing a successful decree might well cause the Court to give judgment for the Aluminum Company upon a purely practical basis, whether or not that basis was acknowledged explicitly in the opinion. While a compromise in this form would be even less satisfactory to the Department, it would not divest the case of all permanent value, for it would be tantamount to judicial recognition that the intent of the Sherman Act cannot be effectuated with existing legal weapons.

SUBROGATION OF PURCHASER TO RIGHTS OF SENIOR MORTGAGEE AGAINST JUNIOR ENCUMBRANCES*

SUBROGATION is the substitution of one person in the place of another with reference to a lawful claim or right.¹ It is purely an equitable doctrine,² presumably borrowed from the Romans,³ but courts of law will recognize its principles.⁴ The basis for its application is that the prospective subrogee has

*Burgoon v. Lavezzo, 92 F. (2d) 726 (App. D. C. 1937).

1. Boley v. Daniel, 72 Fla. 121, 72 So. 644 (1916); Federal Union Life Ins. Co. v. Deitsch, 127 Ohio St. 505, 189 N. E. 440 (1934); see HARRIS, SUBROGATION (1889) § 1.

2. Massachusetts Hospital Life Ins. Co. v. Shulman, 238 Mass. 119, 12 N. E. (2d) 856 (1938); see Fink v. Mahaffy, 8 Watts 384 (Pa. 1839); SHELDON, SUBROGATION (2d ed. 1893) § 1.

3. See 1 STORY, EQUITY (1836) § 635; DIXON, SUBROGATION (1862) 7-20 (setting forth Roman sources); HARRIS, SUBROGATION (1889) § 1 (subrogation derived from the civil law). But see Comment (1933) 31 MICH. L. REV. 826, 829 (questioning Roman law as source of subrogation).

4. Boyd v. Finnegan, 3 Daly 222 (N. Y. 1870); SHELDON, SUBROGATION (2d ed. 1893) § 1.

assumed or satisfied an obligation for which another is primarily liable.⁵ By subrogation, he obtains the rights, priorities, remedies, liens, and securities of the former obligee.⁶ A time-honored distinction is made between conventional and legal subrogation. Conventional subrogation arises by express or implied understanding, and "occurs where one having no interest in or relation to the matter pays the debt of another and by agreement is entitled to the securities and rights of the creditor so paid."⁷ Legal subrogation is not dependent upon contract.⁸ But it constitutes by far the most important division of the doctrine, for, although it was at first of limited scope, its possibilities as an equitable remedy were soon realized, and today a respectable body of opinion sanctions its application in a wide variety of situations. This flexibility is often epitomized in the statement that legal subrogation is applicable to all cases where one not a volunteer pays an obligation which in justice and good conscience ought to have been paid by another.⁹ But the test here implied is not broad enough. It is perhaps truer to say that equity will apply the principle in any case in which justice requires,¹⁰ although a minority of courts deny that the doctrine is benevolent and refuse to adopt the "liberal" attitude.¹¹ In theory, the two types of subrogation are supplementary, for underlying legal subrogation is an element of compulsion, expressed negatively in the exclusion of the "volunteer," and demonstrated by its historical use to aid a surety who paid the debt of his principal.¹² But

5. *Offer v. Superior Court of City and County of San Francisco*, 194 Cal. 114, 228 Pac. 11 (1924). See cases cited *infra* notes 9 and 10.

6. *Page Trust Co. v. Godwin*, 190 N. C. 512, 130 S. E. 323 (1925); *United States F. & G. Co. v. Bramwell*, 108 Ore. 261, 217 Pac. 332 (1923); *cf. Ohio Ins. Co. v. Winn*, 4 Md. Ch. Dec. 253 (1849).

The subrogee is also subject to the defenses against the former obligee. See *United States M. & S. Ins. Co. v. A/S Den Norske A. OG A. Line*, 65 F. (2d) 392, 393 (C. C. A. 2d, 1933); *cf. Fidelity and Casualty Co. of New York v. Farmers' and Merchants' Bank of Tolu*, 223 Ky. 32, 2 S. W. (2d) 1048 (1928).

7. *Marianna Nat. Farm Loan Ass'n v. Braswell*, 95 Fla. 510, 116 So. 639 (1928); *Boley v. Daniel*, 72 Fla. 121, 72 So. 644 (1916); *Federal Land Bank v. Barron*, 173 Ga. 242, 160 S. E. 228 (1931); *Federal Union Life Ins. Co. v. Deitsch*, 127 Ohio St. 505, 189 N. E. 440 (1934); *cf. Industrial Trust Co. v. Hanley*, 53 R. I. 180, 165 Atl. 223 (1933). Conventional subrogation is subject to general contract law.

8. *Erwin v. Brooke*, 159 Ga. 683, 126 S. E. 777 (1925); *Ross v. Jones*, 174 Wash. 205, 24 P. (2d) 622 (1933); HARRIS, SUBROGATION (1889) §§ 4, 5.

9. See *McCracken County v. Lakeview Country Club*, 254 Ky. 515, 524, 70 S. W. (2d) 938, 942 (1934); *Criswell v. McKnight*, 120 Neb. 317, 324, 232 N. W. 586, 589 (1930); *In re Farmers' & Merchants' State Bank of Nooksack*, 175 Wash. 78, 85, 26 P. (2d) 631, 633 (1933).

10. See *Boney v. Central Mut. Ins. Co. of Chicago*, 213 N. C. 563, 568, 197 S. E. 122, 126 (1938); *State v. Citizens' State Bank of Royal*, 118 Neb. 337, 343, 224 N. W. 868, 870 (1929); *cf. Dorrah v. Hill*, 73 Miss. 787, 793, 19 So. 961, 962 (1896).

11. See *Citizens Mercantile Co. v. Easom*, 158 Ga. 604, 611, 123 S. E. 883, 886 (1924). Georgia seems to be having considerable difficulty with subrogation. Compare *Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374 (1901), with *Ragan v. Standard Scale Co.*, 128 Ga. 544, 58 S. E. 31 (1907), and with *Federal Land Bank v. Barron*, 173 Ga. 242, 160 S. E. 228 (1931).

12. That compulsion is an important factor see: *Netherton v. Farmers' Exchange Bank of Gallatin*, 228 Mo. App. 296, 63 S. W. (2d) 156 (1933); *Bursell v. Morgan*,

since in conventional subrogation an agreement may be implied,¹³ and in legal subrogation the class of persons included within the term "volunteer" has been reduced,¹⁴ the dichotomy has in practice lost distinctness.¹⁵

The definitive boundaries within which subrogation may be invoked are difficult to describe, although the tendency is undoubtedly to extend its field of usefulness.¹⁶ But the path of the prospective subrogee is fraught with peril, for courts have erected numerous conceptual obstacles to the exercise of the remedy. A recent liberal case presents a typical fact set-up in which subrogation has proven useful, and summarizes the legal difficulties confronting one desirous of availing himself of its benefits.¹⁷ One G and his wife, owners of a plot of land, encumbered the property with three separate deeds of trust, all of record, as security for three separate loans. Unable to pay any of these obligations, they conveyed their equity of redemption in fee simple to D, holder of the second trust deed, representing that the first mortgage was the only other encumbrance upon the property. Plaintiff later purchased the land from D, subject to the first trust deed, with the amount due under that instrument subtracted from the stated purchase price, and the balance paid in cash to D to apply to the payment, discharge, and release of the second trust.¹⁸ There was no mention of the third encumbrance, and

181 Minn. 462, 233 N. W. 12 (1930); *Chrisman v. Daniel*, 278 N. W. 565 (Neb. 1938); *Gersetta Corporation v. Equitable Trust Co. of New York*, 241 N. Y. 418, 150 N. E. 501 (1926); *Bingham v. Walker Bros.*, 75 Utah 149, 283 Pac. 1055 (1929); *Longview School District No. 112 v. Stubbs Electric Co.*, 160 Wash. 465, 295 Pac. 186 (1931).

The application of subrogation in a suretyship case dates back at least to the 17th century in the English Chancery with the case of *Morgan v. Seymour*, 1 Ch. Rep. 120, 21 Eng. Repr. 525 (1637).

13. *Mains v. Barnhouse*, 209 Iowa 963, 229 N. W. 218 (1930); *George A. Hoagland & Co. v. Decker*, 118 Neb. 194, 224 N. W. 14 (1929); *Commercial & Farmers' Bank v. Scotland Neck Bank*, 158 N. C. 238, 73 S. E. 157 (1911); *First State Bank v. Farmers' & Merchants' Nat. Bank*, 262 S. W. 225 (Tex. Civ. App. 1924). *Contra*: *Hutchinson v. Rice*, 105 La. 474, 29 So. 898 (1901) [based on statute, LA. CIV. CODE ANN. (Dart, 1932) art. 2160]; *Federal Land Bank v. Barron*, 173 Ga. 242, 160 S. E. 228 (1931) *semble*; see *Browder & Co. v. Hill*, 136 Fed. 821, 823 (C. C. A. 6th, 1905).

14. See note 28, *infra*.

15. In many cases it is possible to attain subrogation through either rationalization. Cf. *Mains v. Barnhouse*, 209 Iowa 963, 229 N. W. 218 (1930); *Minton v. Sutton*, 109 N. J. Eq. 403, 135 Atl. 693 (1927). One may, of course, contract for subrogation where it would follow by operation of law anyway. Subrogation may also be modified or abolished by contract. See *Bater v. Cleaver*, 114 N. J. Law 346, 354, 176 Atl. 889, 892 (1935). When subrogation is discussed, legal subrogation is usually meant.

16. See *Emmert v. Thompson*, 49 Minn. 386, 391, 52 N. W. 31, 32 (1892); *Boney v. Central Mut. Ins. Co. of Chicago*, 213 N. C. 563, 568, 197 S. E. 122, 126 (1938); *Martin v. Hickenlooper*, 90 Utah 150, 154, 59 P. (2d) 1139, 1140 (1936); 2 JONES, CHATTEL MORTGAGES & CONDITIONAL SALES (6th ed. 1933) § 659a.

17. *Burgoon v. Lavezzo*, 92 F. (2d) 726 (App. D. C. 1937).

18. The conveyance by the mortgagor to the mortgagee of the equity of redemption will not effect a merger if the parties intend otherwise. *Factors & T. Ins. Co. v. Murphy*, 111 U. S. 738 (1884); *The Bergen*, 64 F. (2d) 877 (C. C. A. 9th, 1933); *Guaranty Trust Co. v. Minneapolis & St. L. R. R.*, 36 F. (2d) 747 (C. C. A. 8th, 1929), *cert.*

apparently no title search was effected. Some four years later, defendants, holders of the third deed of trust, instituted foreclosure proceedings and advertised the property for sale. Plaintiff brought suit to restrain this action, claiming subrogation to the position of the holder of the second trust deed in the amount that was paid under that obligation at the time of the purchase. Defendants contended that, the second trust having been released of record, the third deed became a second lien to the exclusion of plaintiff's claim. The Court of Appeals for the District of Columbia, after an exhaustive survey of the authorities, reversed a judgment for defendants and held that the plaintiff was subrogated to the second lienor's position.¹⁹

All courts subscribe to the rule that subrogation will not be permitted a mere "volunteer."²⁰ But there is no general agreement as to the personification of the word. A minority of courts is prone to call everyone a volunteer who was not in the position of a surety or who did not have some previous interest to protect in the subject matter in question.²¹ At the other extreme, the liberal view leads to the result that the only volunteer would be one who, without an invitation from any other party and purely as a philanthropist, relieved another from an obligation.²² The court in the principal case, after citing examples of both strict and liberal construction, concluded that to call the present plaintiff a volunteer would flout reality. In its opinion a purchaser who advanced money in the expectation of obtaining a title unencumbered except for a first lien could hardly be designated an officious intermeddler.²³ Support can be derived from other specific decisions which have held that the label does not embrace one who pays another's debt under the erroneous belief that he is liable therefore,²⁴ nor one who advances money to satisfy

denied, 281 U. S. 756 (1930). The court in the instant case found as a fact that until the date of the record release by *D*, it was his intention to preserve the lien for his own protection.

19. *Burgoon v. Lavezzo*, 92 F. (2d) 726 (App. D. C. 1937). The court intimated that its own preference would have dictated a stricter rule of subrogation, but that it felt itself bound by the liberal views expressed in other federal court decisions, *i.e.*, *Barnes v. Cady*, 232 Fed. 318 (C. C. A. 6th, 1916); *Stowers v. Wheat*, 78 F. (2d) 25 (C. C. A. 5th, 1935); *Rachal v. Smith*, 101 Fed. 159 (C. C. A. 5th, 1900).

20. *SHELDON, SUBROGATION* (2d ed. 1893) § 240.

21. *Federal Land Bank v. Barron*, 173 Ga. 242, 160 S. E. 228 (1931); *Wilson v. Smith*, 213 Ky. 836, 281 S. W. 1008 (1926); *Hinman v. Mason*, 149 Va. 267, 136 S. E. 573 (1927); *cf. Erickson v. Foote*, 112 Conn. 662, 153 Atl. 853 (1931); *Meier v. Planer*, 107 N. J. Eq. 398, 152 Atl. 246 (1930).

22. *Neer v. Neer*, 80 S. W. (2d) 240 (Mo. App. 1935); *Nelson v. Nelson*, 58 N. D. 134, 226 N. W. 476 (1929); *cf. Rachal v. Smith*, 101 Fed. 159, 165 (C. C. A. 5th, 1900). See notes 24 and 25, *infra*.

23. *Cf. Joyce v. Dauntz*, 55 Ohio St. 538, 45 N. E. 900 (1896); *Johnson v. Tootle*, 14 Utah 482, 47 Pac. 1033 (1897). *Contra: Fidelity & Deposit Co. v. Vance*, 135 Okla. 24, 245 Pac. 578 (1926).

24. *Mosher v. Conway*, 45 Ariz. 463, 46 P. (2d) 110 (1935); *Boney v. Central Mut. Ins. Co. of Chicago*, 213 N. C. 563, 197 S. E. 122 (1938); see *Coke v. Bargainnes*, 116 S. W. (2d) 904, 907 (Tex. Civ. App. 1938) (payment made under erroneous belief that it was necessary for the protection of an interest).

an obligation at the request of the debtor.²⁵ It is, furthermore, possible to escape the rule by means of an agreement²⁶ implied in the payor's justifiable expectations as to his secured position.²⁷ Beyond this it may only be added that the modern tendency is to use the label "volunteer" in an ever narrowing sense.²⁸

Subrogation is universally denied to the party primarily liable.²⁹ The issue of primariness is brought into relief where, as in the instant case, the person seeking subrogation is the purchaser of mortgaged property and desires subrogation with reference to one of the encumbrances. Inquiry must then be directed to whether the petitioner bought subject to the second encumbrance, in which case the primary obligation would rest upon another,³⁰ or whether he assumed that encumbrance, in which case he himself is the primary obligor.³¹ When a mortgage is paid as part of the purchase price without a clear expression of what was intended, courts split as to the proper interpretation of the transaction. The liberal view postulates that that fact alone is not sufficient to make the purchaser the primary obligor with reference to the satisfied obligation.³² It is true that the court in the principal case recognized at least the formal force of the argument that a purchaser who supplies money to discharge a lien should be treated as if he had assumed and later discharged the lien as primary obligor. But it pointed out that the sole reason the plaintiff-purchaser failed to stipulate for a conveyance of the

25. *Teal v. Thompson*, 180 Ark. 63, 20 S.W. (2d) 307 (1929); *Baker v. Farmers' Bank of Conway*, 220 Mo. App. 85, 279 S.W. 428 (1926); *Banks v. Cartwright*, 26 S.W. (2d) 708 (Tex. Civ. App. 1930).

26. See note 7, *supra*.

27. *Ingram v. Jones*, 47 F. (2d) 135 (C. C. A. 10th, 1931); *Thomas v. Lester*, 166 Ga. 274, 142 S.E. 870 (1928); *Kuske v. Staley*, 138 Kan. 869, 28 P. (2d) 723 (1934); *Prudential Ins. Co. of America v. Qualset*, 116 Neb. 706, 218 N.W. 734 (1928); *Blesse v. Wessels*, 18 S.W. (2d) 724 (Tex. Civ. App. 1929); *In re Farmers' & Merchants' State Bank of Nooksack*, 175 Wash. 78, 26 P. (2d) 631 (1933); see *Wallace v. Benner*, 200 N.C. 124, 130, 156 S.E. 795, 798 (1931). But *cf.* *Federal Land Bank v. Barron*, 173 Ga. 242, 160 S.E. 228 (1931).

28. See *Boney v. Central Mut. Ins. Co. of Chicago*, 213 N.C. 563, 568, 197 S.E. 122, 126 (1938); 5 POMEROY, *EQUITY JURISPRUDENCE* (4th ed. 1919) § 2348n; *Comment* (1938) 24 VA. L. REV. 771.

29. *SHELDON, SUBROGATION* (2d ed. 1893) § 46.

30. See 2 JONES, *MORTGAGES* (8th ed. 1928) § 911; *SHELDON, SUBROGATION* (2d ed. 1893) §§ 26, 28.

31. *Duke v. Kilpatrick*, 231 Ala. 51, 163 So. 640 (1935); *Lamoille County Sav. Bank & T. Co. v. Belden*, 90 Vt. 535, 98 Atl. 1002 (1916); see *Lackawanna Trust & Safe Dep. Co. v. Gomerlinger*, 236 Pa. 179, 188, 84 Atl. 757, 760 (1912); *cf.* *Winans v. Hare*, 46 Okla. 741, 148 Pac. 1052 (1915).

32. Purchaser not primary obligor: *Barnes v. Cady*, 232 Fed. 318 (C. C. A. 6th, 1916); *Capitol Nat. Bank v. Holmes*, 43 Colo. 154, 95 Pac. 314 (1908); *Williams v. Libby*, 118 Me. 80, 105 Atl. 855 (1919); *Joyce v. Dauntz*, 55 Ohio St. 538, 45 N.E. 900 (1896); *Johnson v. Tootle*, 14 Utah 482, 47 Pac. 1033 (1897).

Purchaser is primary obligor: *Citizens Mercantile Co. v. Easom*, 158 Ga. 604, 123 S.E. 883 (1924); *Stastny v. Pease*, 124 Iowa 587, 100 N.W. 482 (1904); *Smith v. Feltner*, 259 Ky. 833, 83 S.W. (2d) 506 (1935); *McDowell v. Jones Lumber Co.*, 42 Tex. Civ. App. 260, 93 S.W. 476 (1906).

equity of redemption and an assignment of the lien which he was advancing funds to discharge³³—thus completely securing his position—was his ignorance of the junior encumbrance. And it concluded that equity, in the absence of intervening considerations, could rectify that mistake by treating the purchaser as an equitable assignee of the second lien.

The court thus rejected the charge, often interposed as a stumbling block in the path of the prospective subrogee, that payment of an obligation without knowledge of intervening liens constitutes negligence.³⁴ Since this negligence is more often apparent than real, some courts have been led to declare that only culpable carelessness will be a bar;³⁵ but such a test would seem to be of little value. The better opinion maintains that negligence is no part of the problem.³⁶ Constructive notice provided by recording statutes has also been an insurmountable obstacle to some tribunals.³⁷ But again the better authority holds that the issue of constructive notice is not determinative.³⁸ Rather is the emphasis in both cases upon the correction of a mistake of fact,³⁹ for which equity is historically adapted, and upon relative equities.

Consonant with the nature of the remedy, an excellent defensive weapon is supplied by the concept of "action in reliance," and all courts agree that subrogation may not successfully be invoked where interested parties have, in good faith, changed their positions in reliance upon the discharge of the obligation in question.⁴⁰ This rule, in reality, is merely a specific application of the more inclusive principle that intervening, superior, or occasionally even

33. See note 18, *supra*.

34. *Cf.* *Coonrod v. Kelly*, 119 Fed. 841 (C. C. A. 3d, 1902); *Troyer v. Bank of De Queen*, 170 Ark. 703, 281 S. W. 14 (1926); *Boley v. Daniel*, 72 Fla. 121, 72 So. 644 (1916); *Mather v. Jenswold*, 72 Iowa 550, 32 N. W. 512 (1887); *Fort Dodge Bldg. & Loan Ass'n v. Scott*, 86 Iowa 431, 53 N. W. 283 (1892).

35. *Stephenson v. Grant*, 168 Ark. 927, 271 S. W. 974 (1925); *Merchants & Mechanics' Bank v. Tillman*, 106 Ga. 55, 31 S. E. 794 (1898); *Traders' Bank v. Myers*, 3 Kan. App. 636, 44 Pac. 292 (1896); *Jackson Trust Co. v. Gilkinson*, 105 N. J. Eq. 116, 147 Atl. 113 (Ch. 1929); *Hill v. Ritchie*, 90 Vt. 318, 98 Atl. 497 (1916).

36. *Cliffside Park Co. v. Progressive Theatres*, 122 N. J. Eq. 109, 192 Atl. 520 (Ch. 1937). See note 39, *infra*.

37. *Stastny v. Pease*, 124 Iowa 587, 100 N. W. 482 (1904); *Goodyear v. Goodyear*, 72 Iowa 329, 33 N. W. 142 (1887); *Kuhn v. National Bank*, 74 Kan. 456, 87 Pac. 551 (1906); *Garwood v. Eldridge*, 2 N. J. Eq. 145 (Ch. 1839); *Conner v. Welch*, 51 Wis. 431, 8 N. W. 260 (1881).

38. *Shaffer v. McCloskey*, 101 Cal. 576, 36 Pac. 196 (1894); *Capitol Nat. Bank v. Holmes*, 43 Colo. 154, 95 Pac. 314 (1908); *Williams v. Libby*, 118 Me. 80, 105 Atl. 55 (1919); *Prestridge v. Lazar*, 132 Miss. 168, 95 So. 837 (1923); *Wilson v. Kimball*, 27 N. H. 300 (1853); *Joyce v. Dauntz*, 55 Ohio St. 538, 45 N. E. 900 (1896).

39. *Chichi & Lombardo Bldg. Co. v. Herrmann*, 121 N. J. Eq. 252, 189 Atl. 625 (Ch. 1937); *Williams v. Libby*, 118 Me. 80, 105 Atl. 855 (1919); *Capitol Nat. Bank v. Holmes*, 43 Colo. 154, 95 Pac. 314 (1908).

40. *Richards v. Griffith*, 92 Cal. 493, 28 Pac. 484 (1891); *Ahern v. Freeman*, 46 Minn. 156, 48 N. W. 677 (1891); *Morris v. Beecher*, 1 N. D. 130, 45 N. W. 696 (1890); *Harner's Appeal*, 94 Pa. 489 (1880); *cf.* *Holt v. Mitchell*, 96 Colo. 412, 43 P. (2d) 388 (1935); *Joyce v. Dauntz*, 55 Ohio St. 538, 45 N. E. 900 (1896); *Kellogg Brothers Lumber Co. v. Mularkey*, 214 Wis. 537, 252 N. W. 596 (1934).

equal equities will defeat subrogation.⁴¹ The limitation is undoubtedly sound and is, in fact, merely the negative of the premise that subrogation will be applied whenever justice and good conscience require. But it is often invoked in circumstances where its application would be questionable. Thus in the situation illustrated by the instant case the argument is usually advanced that to permit subrogation is to impair materially and unjustly the position of the junior lienor. It seems clear that this is pure question begging; the junior lienor has a right to advance only if the prior encumbrance was paid by one not entitled to subrogation. Courts which detect this logical fallacy point out, in addition, that subrogation merely restores the junior lienor to his original status and that he has no "right" to a better lien position purely because of another's mistake.

While the instant case deals with encumbrances upon residential property, similar situations sometimes, though infrequently, occur in the field of railroad finance. Where a series of railroad bonds have been or are to be retired with borrowed money, the problem arises as to whether or not those supplying the funds should be subrogated to the position of the creditors satisfied as against intervening lienors. The question would arise only where the security back of the satisfied obligation is cancelled or discharged, or where the obligation itself has matured.⁴² In the typical case the relative priorities are well determined by specific provisions in contract or indenture, and the junior lienor against whom subrogation is sought usually is fortified by a provision in the trust indenture addressed to him to the effect that no future liens will be granted priority over his lien. Any attempt at subrogation by agreement between the railroad company and a third party would therefore be a breach of the contract with said junior lienor, and conventional subrogation would probably not be allowed.⁴³ And since in all probability there will be full knowledge by all parties of all liens and obligations involved so that a mistake of fact will not be present, legal subrogation would likewise presumably be denied. But apart from this restrictive tendency in the railroad field, the liberal view adopted by the federal court in the principal case in deciding for the plaintiff is certainly in the ascendency. Courts apparently are adopting the attitude that the prospective subrogee certainly does not intend to benefit everyone else to his own detriment, and that, if justice may be served by allowing subrogation, conceptual and formalistic arguments should not interpose a bar to the granting of relief.

41. *Jefferson Standard Life Ins. Co. v. Brunson*, 226 Ala. 16, 145 So. 156 (1932); *Stephens v. McCormack*, 50 Nev. 383, 263 Pac. 774 (1928); *Bell v. Greenwood*, 229 App. Div. 550, 242 N. Y. Supp. 149 (2d Dep't 1930); *Walker v. Queen Ins. Co.*, 136 S. C. 144, 134 S. E. 263 (1926); see *SHELDON, SUBROGATION* (2d ed. 1893) § 4.

42. If the securities are not cancelled, an ordinary transfer, sale, or assignment would be effected. When the debt itself has matured, some fiction such as subrogation is necessary to keep it alive after it has been satisfied, the securities being worthless otherwise even if they are not discharged.

43. See note 41, *supra*.

"DOUBLE LIABILITY" OF GARNISHEES RESULTING FROM
FAILURE OF JURISDICTION*

IN legal theory, a garnishee is merely a "disinterested stakeholder,"¹ but in fact he must exercise scrupulous vigilance if he is to avoid the risk of serious damage to his own interests. For when a garnishee turns over to the plaintiff or to the court registry the property or credits of the defendant in his hands, his obligation to his creditor, the defendant, is discharged only if he does so in obedience to a valid judgment or court order. If, for any reason, the garnishee could legally have avoided such disbursement, his payment is considered voluntary² and is no defense to a subsequent action by the former defendant.³ Accordingly, if the garnishment proceedings were deficient in any jurisdictional particular, although the garnishee has once, and apparently dutifully, paid out the sum owing to the defendant, he may be forced to pay the same debt a second time.

As in other legal proceedings, such failure of jurisdiction may result from a multitude of improprieties, many of which are insignificant with respect to the equities involved and are thereby easily overlooked. But in garnishment actions, which are exclusively statutory in origin, judges are especially prone to deem vital minute deviations from prescribed procedure.⁴ Garnishees have fallen victim to rulings that incorrect service on the garnishee is a jurisdictional defect which cannot be waived by appearance.⁵ Entering of judgment against the garnishee before judgment against the defendant frequently eventuates in "double liability" of the garnishee.⁶ And even if the garnish-

*Pulitzer Publishing Co. v. Current News Features, Inc., 94 F. (2d) 682 (C. C. A. 8th, 1938).

1. See 2 SHINN, ATTACHMENT AND GARNISHMENT (1900) 838; cf. *Simmons v. Missouri Pac. R. R.*, 19 Mo. App. 542 (1885).

2. *Balk v. Harris*, 122 N. C. 64, 30 S. E. 318 (1898); *Cole v. Utah Sugar Co.*, 35 Utah 148, 99 Pac. 681 (1909). It is only when the garnishee is compelled to pay by valid process that his payment to the defendant's creditor is construed to be at the implied request of the defendant. See 2 SHINN, *op. cit. supra* note 1, at 1154, 1155.

3. *Bessemer Savings Bank v. Anderson*, 134 Ala. 343, 32 So. 716 (1902); *Southern Ry. v. Newton*, 106 Ga. 566, 32 S. E. 658 (1899); see 2 SHINN, *op. cit. supra* note 1, at 1154. See cases cited *infra* notes 4 to 9. *Contra*: *Katt v. Swartz*, 199 Mich. 51, 165 N. W. 717 (1917), cited *infra* note 28.

4. *Emery v. Royal*, 117 Ind. 299, 20 N. E. 150 (1889) (justice of the peace failed to enter the judgment in garnishment on the docket); *Louisville, N. A. & C. Ry. v. Lake*, 5 Ind. App. 450, 32 N. E. 590 (1892) (amount of statutory bond not given on its face); *Stimpson v. Malden*, 109 Mass. 313 (1872) (writ made returnable several days too soon); *Dutcher v. Grand Rapids Fire Ins. Co.*, 131 Mich. 671, 92 N. W. 345 (1902) (affidavit in alternative and so void).

5. *Hebel v. Amazon Ins. Co.*, 33 Mich. 400 (1876); *Pumphrey v. Hunter*, 270 S. W. 237 (Tex. Civ. App. 1925); cf. *Vittert v. Melton*, 78 S. W. (2d) 467 (Mo. App. 1935). In almost all other proceedings, jurisdiction over the person, as distinct from jurisdiction over the subject matter, can be conferred by appearance.

6. *Whitcomb v. Atkins*, 40 Neb. 549, 59 N. W. 86 (1894); *Shoemaker v. Pace*, 41 S. W. 498 (Tex. Civ. App. 1897); see WAPLES, ATTACHMENT AND GARNISHMENT (2d ed. 1895) § 921.

ment proceedings are themselves impeccably correct, since they are jurisdictionally dependent on the main cause,⁷ absence of jurisdiction over the principal defendant for any reason renders the garnishment void.⁸

An astonishingly large number of similar predicaments⁹ turn up in the reports,¹⁰ probably due in the main to the business man's ready compliance with seemingly authoritative legal mandates, especially when he believes he has nothing to lose. Doubts must be cast on the efficacy of legal machinery which allows well-intentioned parties to be so easily lured into fatal conceptual pitfalls. For even large firms, relying on presumably competent legal counsel, may be trapped.

In 1929, Current News Features, Inc., a non-resident, was sued for libel in a Missouri court. The plaintiff attempted to secure service by publication and to garnishee an acknowledged debt of \$4000 owed by the Pulitzer Publishing Co. to Current News. On a court order, the Pulitzer Co. paid that sum into court. Current News, however, secured the removal of the case to a federal court, and, on motion, had the service and attachment quashed because of a technical defect in the publication. Nothing was done with respect to the money deposited by the garnisheed Pulitzer Co. Accordingly, the plaintiff in the libel suit instituted another action against Current News in the same state court, and this time the state court clerk, as an individual, was summoned as garnishee. Default judgment was entered and the clerk, complying with a court order, paid the \$4000 to the plaintiff. Some time later, Current News sued the Pulitzer Co. in federal court on the original debt and was awarded judgment.¹¹

The Pulitzer Co. of course entered a defense of payment, claiming that the placing of the fund in the hands of the court clerk had transferred the

7. Southern Ry. v. Newton, 106 Ga. 566, 32 S. E. 658 (1899); Missouri, K. & T. Ry. v. Houseley, 37 Okla. 326, 132 Pac. 330 (1913); see cases cited *infra* note 8. But see Simmons v. Missouri Pac. R. R., 19 Mo. App. 542 (1885).

8. Defendant was outside the territorial purview of a court of limited jurisdiction. Egnatik v. Riverview State Bank, 114 Kan. 105, 216 Pac. 1100 (1923); Ludvickson v. Severy State Bank, 105 Kan. 225, 182 Pac. 396 (1919). Defendant, a partnership, was incorrectly sued in firm name. Johnson Mach. Co. v. Watson, 57 Mo. App. 629 (1894). Defendant had died before judgment. Loring v. Fulger, 73 Mass. 505 (1856). Defendant had never been served with process. Vaselopolous v. Hackley Nat. Bank, 220 Mich. 681, 190 N.W. 624 (1922); First State Bank of Addington v. Lattimer, 48 Okla. 104, 149 Pac. 1099 (1915).

9. *E.g.*, the defendant in the principal proceedings was not the garnishee's actual creditor. State v. Grugett, 228 Mo. App. 8, 63 S.W. (2d) 413 (1933). The garnishment proceedings were based on a judgment already assigned, although at the time he paid, the garnishee had no notice of the assignment. Brown v. Ayres, 33 Cal. 525 (1867). Property sought to be garnished was exempt from attachment. Upper Blue Bench Irrigation Dist. v. Continental Nat. Bank, 93 Utah 325, 72 P. (2d) 1048 (1937). The proceedings against the defendant were void for want of jurisdiction over the subject matter. Drake v. DeSilva, 124 App. Div. 95, 108 N. Y. Supp. 1039 (3d Dep't 1908); Stewart v. Northern Assurance Co., 45 W. Va. 734, 32 S.E. 218 (1898).

10. See Note (1927) 49 A. L. R. 1411, in which 43 such cases are cited.

11. Pulitzer Publishing Co. v. Current News Features, Inc., 94 F. (2d) 682 (C. C. A. 8th, 1938).

ownership of the fund to Current News, and that the second state court suit was an adjudication of such ownership, binding on Current News. The court, however, sustained the position of Current News that it had never owned the \$4000, and held that there had been no adjudication of the question since the second state court suit was void. First, it was said, the garnishment process should have been served on the court clerk in his official capacity;¹² secondly, the court never acquired quasi-in-rem jurisdiction over the non-resident Current News since Current News did not in fact own the funds attached.¹³ While this reasoning seems circular,¹⁴ the court's conclusion that the funds still belonged to the Pulitzer Co. is supported by authority¹⁵ and by a persuasive conceptual argument that the transfer of money by the Pulitzer Co. was a bare bailment to the clerk as a private person.¹⁶ No other significance could be lent to this transaction by the supposed court order, which was technically non-existent. Moreover, as the Pulitzer Co. was a debtor of Current News rather than a bailee of the fund, the funds bailed with the clerk could not be said to be the property of Current News.

It is possible to argue otherwise,¹⁷ but even if the judgment in the second state court suit, declaring Current News' ownership, could be supported, the Pulitzer Co. in seeking to take advantage of it as *res judicata* would run into a conceptual contradiction. Following orthodox doctrine, to be entitled to plead the judgment the Pulitzer Co. would have to establish its privity to

12. There is little or no authority in the reports for this holding. In theory, there had been no deposit in the registry of the court, since the only way that could have been brought about was by a valid court order. *People v. Cobb*, 10 Colo. App. 478, 51 Pac. 523 (1897); *Texas & P. Ry. v. Walker*, 93 Tex. 611, 57 S. W. 568 (1900). And the order to pay in the first state court suit was, like everything else in that suit, nugatory for want of jurisdiction.

13. There is universal support for this view. *Pennoyer v. Neff*, 95 U. S. 714 (1877); *Kennedy v. Schleindl*, 290 Pa. 38, 137 Atl. 815 (1927).

14. *I.e.*, the money may not be said to belong to Current News because the state court had no jurisdiction; and the court had no jurisdiction because the money did not belong to Current News.

15. *Brandt v. Rabenstein*, 31 Ohio Circ. Ct. 48 (1908); *Yeiser v. Cathers*, 73 Neb. 317, 102 N. W. 612 (1905). An unauthorized payment to a clerk of court is not a payment to one's creditor. *Texas & P. Ry. v. Walker*, 93 Tex. 611, 57 S. W. 568 (1900); *Whitesboro v. Diamond*, 75 S. W. 540 (Tex. Civ. App. 1903). All of the cases cited in notes 4 to 9, *supra*, in which the garnishee delivered funds to a court official, are implicitly based on this principle.

16. See note 12, *supra*.

17. *E.g.*, the delivery of money to the clerk during the first state court suit was to the use of either the plaintiff in that suit or of Current News. Consequently, since Current News could have sued the court clerk in his private capacity for money had and received after that suit was quashed [*Hunt v. Milligan*, 57 Ind. 141 (1877); *cf. Deal v. Mississippi County Bank*, 79 Mo. App. 262 (1899)] the money may be said to have been the property of Current News, and the state court accordingly acquired jurisdiction over Current News when the funds were attached. Further, the clerk was properly garnisheed as an individual, since the criterion of whether a person can be garnisheed is whether the defendant could sue him at law for the property or debt sought so to be attached. *Atwood v. Hale*, 17 Mo. App. 81 (1885); 2 SHINN, *op. cit. supra* note 1, at 849.

such judgment, and privity could arise in this situation only if the garnishee were the bailee of the Pulitzer Co.¹⁸ And so to be in a position to maintain that Current News was bound by the adjudication that the \$4000 belonged to it, the Pulitzer Co. would be forced to assert that it had been itself the owner of the fund.¹⁹

Technically, then, the instant decision can not be criticized, despite the patently unfair result. It is quite on a par with the numerous other holdings resulting in "double liability." It must further be admitted that had the Pulitzer Co. or its attorneys acted with exceeding prudence, double payments might have been avoided. At the outset, the Pulitzer Co. should have ascertained whether jurisdiction had been competently acquired over Current News before parting with any funds. This could have been done by examining the affidavit and return accompanying the order of publication, or by communicating with Current News. Communication has, in fact, been held to be the garnishee's duty to his creditor.²⁰ Having discovered the irregularity, the Pulitzer Co. was privileged,²¹ or even under a "duty,"²² to plead to the jurisdiction of the court.

Once caught in the tangle, escape was much more difficult, but speculation suggests a few possible expedients. After the first state court suit had been quashed in the federal court, the Pulitzer Co. might have moved in the federal court for the return of the money delivered to the state court clerk. While the federal court would have no jurisdiction over the state court clerk as an individual, and consequently could not issue an authoritative order against

18. It would be fruitless to claim that the clerk was the Pulitzer Co.'s agent, since the Missouri rule is that the garnishment of property in the hands of an agent of defendant's debtor is void. *Provenchers v. Reifess*, 62 Mo. App. 50 (1895).

19. Although the absolute requirement of privity has been once repudiated [*Coca-Cola Co. v. Pepsi-Cola Co.*, 172 Atl. 260 (Del. Super. Ct. 1934)], that decision would be of questionable support to the Pulitzer Co. here. The holding was that the plea of *res judicata* may be raised by one not a party to the prior suit against the plaintiff in that prior suit, and it is doubtful whether this principle would, or should, be extended against a defendant in a prior suit which went by default.

20. It has been held that a garnishee, to be entitled to set up a prior judgment in garnishment proceedings as a defense to an action by the former defendant, must prove he has discharged his duty to his creditor (the defendant) by giving him notice of the suit and by interposing any available defense. *St. Louis & S. F. R. R. v. Crews*, 51 Okla. 144, 151 Pac. 879 (1915); see *Harris v. Balk*, 198 U.S. 215, 228 (1905); *Stewart v. Northern Assur. Co.*, 45 W. Va. 734, 741, 32 S. E. 218, 220 (1898); *Morgan v. Neville*, 74 Pa. 52, 57 (1873).

21. *Vittert v. Melton*, 78 S. W. (2d) 467 (Mo. App. 1935); see *First Nat. Bank of Palatine v. Hahnemann Inst. of Chicago*, 356 Ill. 366, 370, 190 N. E. 707, 709 (1934).

22. *St. Louis & S. F. R. R. v. Crews*, 51 Okla. 144, 151 Pac. 879 (1915); see *State v. Grugett*, 228 Mo. App. 8, 13, 63 S. W. (2d) 413, 416 (1933). The garnishee really owes the duty to himself, since he submits to the jurisdiction of the court at his own peril. But cf. *Simmons v. Missouri P. R. R.*, 19 Mo. App. 542 (1885), where the garnishee resisted payment on the plea of no jurisdiction over the defendant, and appealed adverse judgments twice. The court, stating that the garnishee has a duty of indifference between the contending parties, held that where he admits indebtedness but delays the plaintiff in his recovery, he ought, if unsuccessful, to pay damages for vexatious appeals.

him,²³ its pronouncement that the money should be paid back to the Pulitzer Co. would probably be respected by the clerk. Even without such assistance, the Pulitzer Co. might have requested the clerk to return the funds. If he refused, the Company could, with some basis in authority, have brought suit in the state court for money had and received,²⁴ although such an action seems never to have been conceived. Certainly, the clerk would not be able to offer a valid judgment or order to justify his disinclination to reimburse the garnishee. Even the disbursement by the clerk to the plaintiff in the state court action may not have ended the Pulitzer Co.'s opportunities, since it might conceivably have maintained a similar action against the plaintiff to recover funds which in equity and conscience belonged to it.²⁵ Perhaps, indeed, this course remained open after the judgment in the principal case.

But whatever may be the conceptual possibilities of recourse by the garnishee against court clerk or plaintiff, the practical inadequacy of such relief is indicated by the fact that there appears to be but one case in the reports in which it has even been sought.²⁶ Nor are admonitions for the use of care a solution to the ever-recurring problem of "double liability," since they will never reach the small business man who complies with garnishment process without consulting a lawyer.²⁷ Of course, under the existing state of the law, the numerous technicalities surrounding garnishment afford but little protection to the defendant, who is often victimized by the use of interstate garnishment as a device to shift the place of trial. But this problem raises a host of issues which are outside the scope of this note, the primary concern of which is to point to the need for some modification of the law whereby a garnishee, who in good faith cooperates with the court machinery, will be protected against his own honest inadvertence. One court, defying theoretical difficulties, has filled the gap by holding that where, by statute, payment into court under a court order absolves the garnishee of all further liability, such payment shall have that effect regardless of whether the court order was

23. *Whitesboro v. Diamond*, 75 S. W. 540 (Tex. Civ. App. 1903).

24. Money paid under a void judgment or decree can be recovered, since it was paid under the erroneous belief that there was a decree requiring its payment, which is deemed a mistake of fact, not of law. *Simmons v. Simmons*, 91 W. Va. 32, 112 S. E. 189 (1922); *Lichtwadt v. Murphy's Adm'r*, 182 Ky. 490, 206 S. W. 771 (1918). But *cf.* *West v. Brown*, 165 Ga. 187, 140 S. E. 500 (1927); *Pardue v. Absher*, 174 N. C. 676, 94 S. E. 414 (1917). A court officer is personally liable for funds received without the authority of a valid court order. See cases cited *supra* note 17; Note (1929) 59 A. L. R. 83.

25. See cases cited in note 24 *supra*; *cf.* *Pumphrey v. Hunter*, 270 S. W. 237 (Tex. Civ. App. 1925). It is well settled that a party who has paid on a judgment is entitled to restitution, or to sue for money had and received, when the judgment is reversed. *Haebler v. Myers*, 132 N. Y. 363, 30 N. E. 963 (1892); *Florence Cotton and Iron Co. v. Louisville Banking Co.*, 138 Ala. 588, 36 So. 456 (1903).

26. *Pumphrey v. Hunter*, 270 S. W. 237 (Tex. Civ. App. 1925). When the original defendant sued the garnishee on the ground that the garnishment proceedings were void, the garnishee entered a cross-action against the original plaintiff. The court intimated such action was maintainable, but dismissed it for extraneous procedural reasons.

27. See Clark and Corstvet, *The Lawyer and the Public* (1938) 47 YALE L. J. 1272, 1282-1285.

rendered with jurisdiction.²⁸ The justice of the peace or court clerk who receives the money is held officially accountable to the garnishee's creditor, the defendant, thus assuring him adequate protection. Although other courts have refused to lend identical statutes such an effect,²⁹ it is probable that if a remedial statute were specifically to provide for discharge of liability even where the court order is "void", all courts would allow it its intended meaning. It should be noted, on the other hand, that the necessary consequence of such a proposal is to shift on to the court official the possibly unfair responsibility of determining whether jurisdiction has been acquired over the principal defendant. Further, unless the court official is bonded, a right of action against him will be a poor substitute for the defendant's present right of action against the garnishee, who is much less likely to be an impecunious party.

Instead, then, of adopting measures which transfer the burden of the hazard of "double liability" on to the defendant or court officer, it would be, in all likelihood, most equitable to impose the cost of the risk on the plaintiff, who alone profits from the use of garnishment process. This could be accomplished by a statutory requirement that the plaintiff post a bond to indemnify the garnishee against the existence of some jurisdictional deficiency which would expose the garnishee to a later suit by the defendant.³⁰ Not only would this provide a thoroughgoing safeguard for the garnishee, but it would probably lead to a salutary diminution in the use of garnishment as a means of oppressing debtors.

DISPOSITION OF ILLEGALLY COLLECTED SALES TAX RECEIPTS*

THE proper distribution of tax proceeds collected under invalid statutes or regulations has in recent years propounded a significant problem. Improper levy and assessment of sales taxes present particularly difficult issues, for, instead of the customary two-party litigation, a tri-partite conflict may arise. The taxing authority, which has or demands possession of the funds, the consumer or purchaser, who originally paid the tax, and the merchant or retailer, who collected the proceeds, may all solicit protection from the courts. In reality, although the interest of the individual purchaser is often mentioned with grave concern, he rarely appears personally in the litigation,¹ but the

28. *Katt v. Swartz*, 199 Mich. 51, 165 N. W. 717 (1917).

29. The principal case is illustrative. The court ignored *Mo. STAT. ANN.* (Vernon, 1932) §§ 1403, 1415. *Cf. Ludvickson v. Severy State Bank*, 105 Kan. 225, 182 Pac. 396 (1919); *Egnatik v. Riverview State Bank*, 114 Kan. 105, 216 Pac. 1100 (1923); *KAN. GEN. STAT. ANN.* (1935) 60-960.

30. Although the usual garnishment bond has as its primary purpose the protection of the defendant from injury through wrongful garnishment, the bond may be conditioned on damage to the garnishee as well.

**Kesbec, Inc. v. McGoldrick*, 278 N. Y. 293, 16 N. E. (2d) 288 (1938).

1. The total tax payments of a given consumer are usually too minute to warrant suit. Even when he is desirous of proving his claim, he is generally unable to do so, either because he failed to pay under protest, or because he did not save the evidence necessary to substantiate his assertions.

concept of the three-sided struggle is maintained by the representations of the retailer that he is demanding a refund or refusing delivery of the receipts as the protector of the purchaser's interest. In opposition, the taxing authority protests that it alone should possess the funds, on the ground that the retailer has no beneficial interest in his collections.²

An approach frequently adopted in disposing of improperly collected moneys is illustrated by a recent New York decision.³ Subsequent to a declaration that part of a New York City gasoline sales tax⁴ had been invalidly assessed,⁵ a retailer sued the comptroller for a refund of his collections deposited with that official pursuant to the statute.⁶ The Appellate Division, reviewing a finding of the comptroller, held that since a void act or law can create neither rights nor duties, the petitioner was under no obligation to collect a tax "void *ab initio*" and similarly under no compulsion to remit collections to the comptroller.⁷ The order directing a refund to the depositor was reversed by the Court of Appeals. That court stated that the petitioner was merely an agent of the city and was therefore not entitled to funds collected for its principal. And it argued further that since the statutory provision for a direct remedy by purchasers against the comptroller presumably absolved the retailer from liability to its customers, it had no beneficial interest in the money. A three-judge minority, vigorously dissenting, pointed out that their prevailing colleagues had unnecessarily thrown the loss of the illegal

2. The typical sales statute levies the tax directly upon the purchaser and not upon the retailer, who is merely the collector. Quite different problems arise where the legislation imposes the tax directly upon the retailer, or where the court interprets the statute to be of the "processing type." Here the retailer is usually allowed recovery. Purchasers are permitted neither to intervene in the adjudication of the retailer's claim nor to recover independently from the state. Yet they may compel a retailer obtaining a refund to reimburse them to the extent that the tax burden has been shifted. See Johnson, *A. A. A. Refunds: A Study in Tax Incidence* (1937) 37 *COL. L. REV.* 910; (1937) 5 *U. OF CHI. L. REV.* 152; (1937) 50 *HARV. L. REV.* 477. Although a sales tax is levied upon purchasers, a retailer, because of competition, may absorb a portion or all of the tax through price reduction. See HAIG AND SHOUP, *THE SALES TAX IN THE AMERICAN STATES* (1934) 358, 526; Legis. (1934) 47 *HARV. L. REV.* 860.

3. *Kesbec, Inc. v. McGoldrick*, 278 N. Y. 293, 16 N. E. (2d) 288 (1938); (1938) 52 *HARV. L. REV.* 330; (1938) 18 *B. U. L. REV.* 790; (1938) 87 *U. OF PA. L. REV.* 242.

4. City of New York, Local Law No. 24, published as No. 25, of 1934, p. 164.

5. *Socony-Vacuum Oil Co. v. New York*, 247 App. Div. 163, 287 N. Y. Supp. 288 (1st Dep't 1936), *aff'd*, 272 N. Y. 668, 5 N. E. (2d) 385 (1936). The court held that a retailer had sufficient interest to contest the validity of the assessment, since the statute compels the retailer to pay the tax if his customers do not. *City of New York, Local Law No. 24*, published as No. 25, of 1934 § 15, p. 173. But it has been held that a retailer has insufficient interest to contest the legality of a sales tax. *Wade v. State*, 97 Colo. 52, 47 P. (2d) 412 (1935); *Morrow v. Henneford*, 182 Wash. 625, 47 P. (2d) 1016 (1935); *Monamotor Oil Co. v. Johnson*, 3 F. Supp. 189 (S. D. Iowa 1933), *aff'd*, 292 U. S. 86 (1934).

6. Although these funds were in petitioner's possession when the assessment was declared invalid, the statute required that petitioner deposit the money with the comptroller in order to contest the comptroller's order that the receipts rightfully belonged to the state. *City of New York, Local Law No. 24*, published as No. 25, of 1934, § 7, p. 169.

7. *Kesbec, Inc. v. Taylor*, 253 App. Div. 353, 2 N. Y. S. (2d) 241 (1st Dep't 1938).

assessment upon either the consumers or the retailers. Consumers could not recover from the state, since the one year statutory period within which tax refund actions could be instituted⁸ had already elapsed. Thus the burden of the invalid assessment fell upon the purchasers unless they were allowed subsequent recovery from the merchants.⁹ The dissent would have preferred a prior interpretation of the statute in question wherein the retailer had been designated a taxpayer and not an agent of the taxing authority¹⁰ and under which the petitioner would have been allowed a refund.¹¹

Results in similar cases have in large part been determined by the fortuitous circumstance of whether or not the proceeds have been turned over to the taxing authority at the time the statute or regulation is declared invalid. Where the money is in the sovereign's possession, courts have frequently used verbalistic techniques similar to that adopted in the instant case. Denial of recovery to retailers has been based upon the doctrines that the plaintiff is a "volunteer collector," estopped from recovery from one for whose benefit he acted;¹² that, since he has not repaid his purchasers, the retailer would be unjustly enriched and therefore comes into court with unclean hands;¹³ that the state has not consented to be sued;¹⁴ that the collector, apart from any doctrine of agency, has insufficient interest to contest the state's retention of the funds;¹⁵ and that the petitioner did not pay the tax involuntarily and under protest.¹⁶ Courts may renounce such rationalizations, however,

8. City of New York, Local Law No. 24, published as No. 25, of 1934, § 10, p. 171.

9. Although petitioner's brief on motion for reargument stressed the fact that the decision allowed the tax officials to collect indirectly what they could not collect directly, the motion was denied. N. Y. L. J., Oct. 13, 1938, p. 1094, col. 1.

10. Matter of Atlas Television Co., 273 N. Y. 51, 6 N. E. (2d) 94 (1936). The United States Supreme Court adopted this interpretation of the same statute in New York City v. Goldstein, 299 U. S. 522 (1937), *rev'g*, *In re Lazaroff*, 84 F. (2d) 982 (C. C. A. 2d, 1936).

11. It appears that petitioner kept a record of some sales and therefore could reimburse these purchasers. The dissent also stressed the fact that the decision bars recovery from the city by purchasers from other retailers, who bought on charge accounts and thus had evidence to substantiate their claims. See *Kesbec, Inc. v. McGoldrick*, 278 N. Y. 299, 301, 16 N. E. (2d) 288, 291 (1938).

12. *Richardson Lubricating Co. v. Kinney*, 337 Ill. 122, 168 N. E. 886 (1929); *cf. Chicago v. Burke*, 226 Ill. 191, 80 N. E. 720 (1907); *Cummings v. Chicago*, 248 Ill. 392, 94 N. E. 46 (1911).

13. *Shannon v. Hughes & Co.*, 270 Ky. 530, 109 S. W. (2d) 1174 (1937); *Standard Oil Co. v. Bollinger*, 337 Ill. 353, 169 N. E. 236 (1929); *Standard Oil Co. v. Bollinger*, 348 Ill. 82, 180 N. E. 396 (1932).

14. *Flower v. State*, 65 Misc. 145, 121 N. Y. Supp. 96 (Ct. Cl. 1909), *aff'd*, 143 App. Div. 871, 128 N. Y. Supp. 208 (3d Dep't 1911).

15. *O'Connell v. Frost*, 73 P. (2d) 87 (Ariz. 1937). *Contra: Standard Oil Co. v. State*, 283 Mich. 85, 276 N. W. 908 (1937); *cf. Van Antwerp v. State*, 218 N. Y. 422, 113 N. E. 497 (1916).

16. *Roxana Petroleum Corp. v. Bollinger*, 54 F. (2d) 296 (C. C. A. 7th, 1931), *cert. denied*, 285 U. S. 554 (1932); *Agni Motor Fuel Co. v. Kinney*, 340 Ill. 17, 172 N. E. 39 (1930). For discussions of the requirement of compulsory payment under protest see *Sclove, Refunds and Recovery of State Taxes* (1935) 41 W. VA. L. Q.

when the retailer has kept accurate records and presumably will distribute the refund to his purchasers.¹⁷ Where, on the other hand, retailers have retained possession of their collections, they are generally able to resist attempts to obtain them by the state.¹⁸ In this situation, the agency doctrine espoused by the majority in the principal case is either modified by an averment that the collector is an involuntary agent against whom the state has no right of recovery,¹⁹ or entirely abandoned with the assertion that a void act can create neither rights nor duties.²⁰ And it has been held that since the state is not an injured party, it may not be permitted to share in the gains made by the dealer's misrepresentation to his purchasers of the validity of the tax.²¹

On the relatively few occasions upon which the consumer enters directly into the litigation,²² the issues take on added complexity. Should his statutory action against the taxing authority fail despite his preservation of evidence tending to prove payment,²³ he might proceed against the tax-collecting retailer. A quasi-contractual action for money had and received would

348, 362; (1934) 11 N. Y. U. L. Q. Rev. 662; (1930) 78 U. of Pa. L. Rev. 920; Notes (1927) 48 A. L. R. 1381; (1931) 74 A. L. R. 1301.

17. *Benzoline Motor Fuel Co. v. Bollinger*, 353 Ill. 600, 187 N. E. 657 (1933); *cf. Van Antwerp v. State*, 218 N. Y. 422, 113 N. E. 497 (1916) (broker allowed refund as trustee for his customers).

18. *Newlin v. Liberty Oil Co.*, 167 La. 831, 120 So. 383 (1929); *Moore v. Eastman Gardiner Lumber Co.*, 156 Miss. 359, 126 So. 44 (1930); *State v. Sunburst Refining Co.*, 76 Mont. 472, 248 Pac. 186 (1926), *cert. denied*, 273 U. S. 722 (1926); *Henry County v. Standard Oil Co.*, 167 Tenn. 485, 71 S. W. (2d) 683 (1934). *Contra: Wade v. State*, 97 Colo. 52, 47 P. (2d) 412 (1935); *Spencer v. Consumers Oil Co.*, 115 Conn. 554, 162 Atl. 23 (1932); *cf. People ex rel. Martin v. Brown*, 55 N. Y. 180 (1873).

19. *State v. Sunburst Refining Co.*, 76 Mont. 472, 248 Pac. 186 (1926), *cert. denied*, 273 U. S. 722 (1926).

20. *Henry County v. Standard Oil Co.*, 167 Tenn. 485, 71 S. W. (2d) 683 (1934); *cf. Newlin v. Liberty Oil Co.*, 167 La. 831, 120 So. 383 (1929) (no evidence to prove retailer passed tax on to customers).

21. *State v. Sunburst Refining Co.*, 76 Mont. 472, 248 Pac. 186 (1926), *cert. denied*, 273 U. S. 722 (1926). In *Moore v. Eastman Gardiner Lumber Co.*, 156 Miss. 359, 126 So. 44 (1930), an action of escheat by the state to recover money collected by the retailer was dismissed as improper.

22. See note 1, *supra*. And should the court interpret the sales tax to be of the "processing" type, it would deny that the purchaser has sufficient interest to intervene for the refund. *Cf. Acme-Evans Co. v. Smith*, 13 F. Supp. 356 (S. D. Ind. 1936); *Washburn Crosby Co. v. Nee*, 13 F. Supp. 751 (W. D. Mo. 1936).

23. In the absence of a statute the purchaser generally may not recover if he did not pay under protest. *Flower v. State*, 65 Misc. 145, 121 N. Y. Supp. 96 (Ct. Cl. 1909), *aff'd*, 143 App. Div. 871, 128 N. Y. Supp. 208 (3d Dep't 1911); see note 16, *supra*. See also *Richardson Lubricating Co. v. Kinney*, 337 Ill. 122, 130, 168 N. E. 886, 889 (1929); *cf. (1933) 67 U. S. L. Rev. 4*. But, since the taxing ordinance in the instant case specifically provided for refunds, and no mention was made of the necessity for protest at payment, purchasers could probably recover without this formality. *People ex rel. Noyes v. Sohmer*, 81 Misc. 522, 143 N. Y. Supp. 475 (Sup. Ct. 1913), *aff'd*, 159 App. Div. 929, 143 N. Y. Supp. 1138 (3d Dep't 1913), *aff'd*, 210 N. Y. 619, 104 N. E. 1138 (1914); *cf. Gubin v. New York*, 150 Misc. 182, 269 N. Y. Supp. 46 (Munic. Ct. 1934).

probably be successful against a merchant who had obtained a refund of his tax collections or who had not yet paid them to the state.²⁴ If the retailer does not possess the funds, the consumer might frame his suit in terms of agency, claiming that the retailer acted on behalf of the state.²⁵ A collector of taxes illegally levied or assessed may be said to be personally liable because he proceeded without the authority and protection of his principal.²⁶ On the other hand, in jurisdictions where, because of an ambiguous statute,²⁷ the retailer may justifiably maintain that he acted as the purchaser's agent,²⁸ he might conceivably be sued on the theory that the scope of his authority was confined to collecting and paying a *constitutional* tax.²⁹

But these rationalizations leave the substantial questions untouched and may with almost equal facility be marshalled on behalf of either litigant. Workable remedies to eliminate confusion have yet to be propounded. Procedures for forestalling the problem by a determination of the validity of the levy or assessment before any funds have been collected are neither universally available nor entirely satisfactory. Advisory opinions are never binding on courts in subsequent adjudications of actual controversies.³⁰ Declaratory judgments fail to solve the difficulty, for the emergency character of most sales taxes inevitably results in the collection of some funds before such a judgment can be procured. And the utility of an injunction against tax collection is seriously impaired by the requirements that the petitioner show

24. *Sinclair Refining Co. v. Rosier*, 104 Kan. 719, 180 Pac. 807 (1919); *Seaboard Air Line Ry. v. Allen*, 82 Fla. 191, 89 So. 555 (1921); see *Van Antwerp v. State*, 218 N. Y. 422, 429, 113 N. E. 497, 499 (1916). But presumably such an action would not be successful if the retailer had paid the money to the taxing authority and had not obtained a refund. See *Christopher v. Hoyer & Co.*, 160 Misc. 21, 22, 239 N. Y. Supp. 105, 106 (Munic. Ct. 1936).

25. The state may make a retailer a tax collector in return for the privilege of doing business within the state. *Monamotor Oil Co. v. Johnson*, 3 F. Supp. 189 (S. D. Iowa 1933), *aff'd*, 292 U. S. 86 (1934); *Pennsylvania v. York Silk Mfg. Co.*, 192 Fed. 81 (C. C. A. 3d, 1911); *cf. Stahmann v. Vidal*, 59 Sup. Ct. 41 (U. S. 1938); *Breaux Ballard, Inc. v. Shannon*, 271 Ky. 553, 112 S. W. (2d) 996 (1938); *Covington v. State Tax Comm.*, 257 Ky. 84, 77 S. W. (2d) 386 (1934).

26. *Ex parte Young*, 209 U. S. 123 (1908); *International Paper Co. v. Burrill*, 260 Fed. 664 (D. Mass. 1919); *Kittredge v. Boyd*, 136 Kan. 691, 18 P. (2d) 563 (1933); *Atlantic Pharmacal Co. v. Comm'r of Corp. & Taxation*, 2 N. E. (2d) 474 (Mass. 1936); see Bondurant, *The Windfall Tax* (1939) 37 MICH. L. REV. 357, 363. But *cf. Anniston Mfg. Co. v. Davis*, 87 F. (2d) 773 (C. C. A. 5th, 1937), *aff'd*, 301 U. S. 337 (1937); *Chappell v. Morris*, 247 Ky. 476, 57 S. W. (2d) 486 (1933); see 3 COOLEY, TAXATION (4th ed. 1924) § 1299; 4 COOLEY, TAXATION (4th ed. 1924) § 1629; Field, *Recovery of Illegal and Unconstitutional Taxes* (1932) 45 HARV. L. REV. 501, 519; (1920) 29 YALE L. J. 574.

27. If the court interprets the statute to be of the "processing" type, the purchaser's right of recovery will of course depend upon his sales contract. *Texas Co. v. Harold*, 228 Ala. 350, 153 So. 442 (1933); see note 2, *supra*.

28. See *Van Antwerp v. State*, 218 N. Y. 422, 429, 113 N. E. 497, 499 (1916).

29. But the counter argument that the parties were laboring under a mutual mistake of fact could easily prevail.

30. See THAYER, LEGAL ESSAYS (1908) 42; Frankfurter, *A Note on Advisory Opinions* (1924) 37 HARV. L. REV. 1002.

irreparable injury and prove the absence of an adequate remedy at law in the nature of a statutory provision for recovery.³¹

Preventive relief being inadequate, the disposition of the collections is almost certain to be contested. The most obvious proposal to facilitate this distribution is to require merchants to keep accurate and complete records of all purchases. The state could thus ascertain the actual taxpayers and, upon a declaration of invalidity, repay directly the portion of the tax borne by each consumer. This presumably would be the most equitable resolution of the conflict, and it would have the additional advantage of preventing costly litigation for refunds. But the practical value of such a plan is doubtful. It would necessitate keeping records of countless small sales for an indeterminate period. The benefits thus attained by ascertaining actual taxpayers in the rare case of an invalid levy or assessment would probably not justify the great economic waste involved.

In default of a comprehensive accounting system, the social and economic arguments are as inconclusive as the legal doctrines. The retailer may attempt to bolster his claim to the refund by contending that, although the tax has been paid by the consumer, he, too, has borne a share of the burden by defraying the expense of collecting and accounting for the levy. Because of price increases resulting from the tax, he may have suffered a decrease in sales with consequent loss of profits,³² and he may argue further that the tax has meant a reduction in the total amount available for the purchase of all goods, further decreasing total turnover.³³ It is said that the loss of potential profit to the merchant gives him some interest in the illegally collected funds, whereas the state, wholly uninjured by its void assessment or levy, can display no such basis for its claim.³⁴

The argument is vulnerable. While it is true that the tax has meant an increase in price, it has been levied equally on all merchants within its scope and therefore no competitive disadvantage has been conferred upon any particular individual.³⁵ The price increase is so slight that it will deter few people from purchases and, hence, affects profits but little. The argument that the exaction has destroyed total income is fallacious, since it has not destroyed purchasing power, but has merely transferred it through the medium of state expenditures.³⁶ Although concededly some check should be placed upon

31. *Rio Oil & Supply Co. v. Duce*, 85 Colo. 287, 275 Pac. 902 (1929); see Field, *Recovery of Illegal and Unconstitutional Taxes* (1932) 45 HARV. L. REV. 501; (1934) 19 CORN. L. Q. 607. Despite a statutory provision for a refund, a class suit by taxpayers to enjoin the enforcement of a tax, allegedly illegal, may be successful if the court is convinced that the injunction will avoid a multiplicity of suits. *Gramling v. Maxwell*, 52 F. (2d) 256 (W. D. N. C. 1931).

32. See BUEHLER, *GENERAL SALES TAXATION* (1932) 237.

33. Merchants also complain that customer resentment against these "nuisance" taxes decreases sales. See HAIG AND SHOUP, *THE SALES TAX IN THE AMERICAN STATES* (1934) 328.

34. This argument was rejected in *Shannon v. Hughes & Co.*, 270 Ky. 530, 109 S. W. (2d) 1174 (1937).

35. But retailers may lose sales to neighboring merchants in tax free areas. See HAIG AND SHOUP, *THE SALES TAX IN THE AMERICAN STATES* (1934) 326.

36. See KING, *PUBLIC FINANCE* (1935) 36.

possible misuse of the taxing power, better means are available than dumping the entire tax into the retailer's lap.³⁷

Perhaps the best solution would be to allow the retailer to retain funds collected but not yet remitted and to refund to him payments already made. Instead of imposing a new levy upon consumers, forcing them to bear the burden of taxation twice to meet a single need, the legislature might then levy an unjust enrichment or "windfall" tax, assessing a certain percentage of that portion of the retailer's net income derived from withholding his refund from the actual taxpayers.³⁸ The state would thus be able to obtain the required funds, and despite strict statutes of limitations,³⁹ the interests of all purchasers who kept records of their payments would be protected. The portion of the refund remaining with the retailer would recompense him for the expenses incurred in collecting the tax.

THE STATUTE OF LIMITATIONS IN INTERNATIONAL EXTRADITION*

UNUSUAL issues of international extradition have been posed by variations in the criminal laws of different nations. The basic problem of double criminality—the principle that the acts of the accused must be proscribed by the criminal codes of both nations—has been often litigated and extensively treated.¹ A less frequently recurring aspect of the same question, arising by virtue of the requirement that the fugitive's acts be *considered* criminal at the time extradition is requested, involves the statutes of limitations of both

37. Perhaps the *reductio ad absurdum* of the argument is the assertion that the refusal to refund the tax to the retailers offers the legislature a panacea for the unbalanced budget. It is claimed that the return of the collections to the merchant presents the only effective deterrent to repeated abuses of the power to tax.

38. The constitutionality of such a tax imposed by the federal government has been upheld. *White Packing Co. v. Robertson*, 89 F. (2d) 775 (C. C. A. 4th, 1937); *Kingan & Co. v. Smith*, 16 F. Supp. 549 (S. D. Ind. 1936). And the Supreme Court has sustained a statute, enacted after collections had been made under an illegal sales tax, which provided that no refunds should be made to a seller unless he could prove that he had not shifted the tax to his purchasers. *United States v. Jefferson Electric Mfg. Co.*, 291 U. S. 386 (1934); see Bondurant, *The Windfall Tax* (1939) 37 MICH. L. REV. 357, 361.

39. Tax refund suits must usually be brought within a relatively short time. See *City of New York, Local Law No. 24*, published as No. 25, of 1934 § 10, p. 171. Actions against the retailer are not so restricted. See N. Y. CIV. PRAC. ACT § 48. For an argument that the period of limitations in refund suits should be extended, see Field, *Recovery of Illegal and Unconstitutional Taxes* (1932) 45 HARV. L. REV. 501, 519.

*President of the United States of America, *ex rel.* *Caputo v. Kelly*, 96 F. (2d) 787 (C. C. A. 2d, 1938).

1. *E.g.*, *Wright v. Henkel*, 190 U. S. 40 (1903); *Collins v. Loisel*, 259 U. S. 309 (1922); *Factor v. Laubenheimer*, 290 U. S. 276 (1933), (1933) 42 YALE L. J. 978; 1 MOORE, EXTRADITION (1891) 112, 113; Borchard, *The Factor Extradition Case* (1934) 28 AM. J. INT. L. 742; Hudson, *The Factor Case and Double Criminality in Extradition* (1934) 28 AM. J. INT. L. 274.

requesting and asylum countries. Its ramifications are illustrated by a recent case.² After one Caputo, a French citizen, had committed murder in Marseilles and fled the country, a French court convicted him *par contumace* (by default proceedings) and sentenced him to death. The French government located him in New York twelve years later and obtained a warrant for extradition proceedings. Caputo sued out a writ of habeas corpus, claiming that the charges against him had been barred by France's statute of limitations. Under French law, although the punishment imposed by a criminal judgment is not barred until twenty years after rendition,³ public prosecution for crimes punishable by death is outlawed ten years after the last charge, indictment or other proceedings.⁴ On the theory that the ten-year statute of the requesting country was controlling, Caputo maintained that extradition was no longer possible. Dismissal of the writ of habeas corpus was affirmed by the Circuit Court of Appeals.⁵ The appellate tribunal pointed out that by the terms of our extradition treaty with France extradition is to be denied only if proceedings or penalty are barred according to the statutes of the *asylum* country.⁶ New York provides no limitations upon either prosecution or punishment for murder, and the opinion then avoided a direct ruling on Caputo's contention that the statute of France, the *demanding* country, would also be controlling, by holding that in any event the French prescription period had not run its course. The fact that French courts consider convictions *par contumace* to be subject to the twenty-year period, rather than to the ten-year prescription for charges,⁷ was, to the majority of the court, determinative.

A dissenting opinion endorsed Caputo's position with an ingenious argument made possible by the differing legal concepts of the two nations. Criminal judgments by default similar to the French conviction *par contumace* occur in many continental jurisdictions,⁸ but they have no counterpart in common

2. President of the United States of America, *ex rel.* Caputo v. Kelly, 96 F. (2d) 787 (C. C. A. 2d, 1938).

3. CODE D'INSTRUCTION CRIMINELLE (Carpentier, 1930) art. 635.

4. *Id.*, art. 637. The prescriptive period will be started anew by such official acts of prosecution as a reconstruction of the crime, interrogation of witnesses, or seizure of evidence. However, it is doubtful if more than one extension could thus be obtained. GARRAUD, PRÉCIS DE DROIT CRIMINEL (15th ed. 1934) § 353(c).

5. President of the United States of America, *ex rel.* Caputo v. Kelly, 96 F. (2d) 787 (C. C. A. 2d, 1938), *aff'g*, President of the United States of America, *ex rel.* Caputo v. Kelly (S. D. N. Y. 1938) (unreported) dismissing second writ of habeas corpus. The first writ of habeas corpus (on objections to evidence) was dismissed in President of the United States of America, *ex rel.* Caputo v. Kelly, 19 F. Supp. 730 (S. D. N. Y. 1937), *aff'd*, 92 F. (2d) 603 (C. C. A. 2d, 1937), *cert. denied*, 303 U. S. 635 (1938) (the Circuit Court of Appeals refused to pass on the present contention, lacking proof of French law, but a dissent suggested new proceedings on this point).

After the second dismissal was affirmed, Caputo was surrendered to France on a State Department warrant dated June 14, 1938.

6. Convention of Jan. 6, 1909, art. VIII, 37 STAT. 1526, at 1531 (1911).

7. Semonin Case, Court of Cassation, Dec. 5, 1861 (D. P. 62.1404); GARRAUD, *op. cit. supra* note 4, § 356(B) (1) (b).

8. *E.g.*, the German *Abwesenheitsurteil*; see STRAFFPROZESSORDNUNG (1877) §§ 276, 277, 282(b), as amended, Law of June 28, 1935, 1935 REICHSGESETZBLATT I, 847.

law countries. In France this sentence has the peculiar status of being impossible of execution, for if the condemned is apprehended before the twenty year prescriptive period has elapsed, he receives a new trial of right. While the default judgment may affect his civil rights and property, it cannot affect his person.⁹ Since the sentence is not definitive, in common law jurisdictions a person convicted *par contumace* has usually been regarded for extradition purposes as one merely charged with crime. This view has been advanced by commentators¹⁰ and consistently adhered to by our Department of State¹¹ and by our courts.¹² Assuming then that Caputo was to be treated as a man charged with murder, the dissenting opinion applied the French limitation on charges and, pursuant to the statute, found them to be outlawed after ten years. The apparent force of the provision of the Extradition Convention mentioning only the prescriptive statutes of the asylum country was discounted by adducing authority that such a provision did not and should not exclude recourse to the statute of limitations of the demanding country.¹³

Despite the logical nicety of the argument, the results are indicative of its sophistic nature. The conviction *par contumace*, completely alien to the common law, was severed from the French trichotomy of convictions, convictions *par contumace* and charges, and forced into the simpler common law dichotomy of convictions and charges. Found to more closely resemble the latter, it was classified as such. Treating it then as a common law charge, the dissent referred back to the French statute of limitations on charges,¹⁴ failing to

9. GARRAUD, *op. cit. supra* note 4, §§ 517-519.

10. See 1 HYDE, INTERNATIONAL LAW (1922) § 327; 1 MOORE, EXTRADITION (1891) § 102; see also English Extradition Act of 1870, 33 & 34 VICT. c. 52, § 26.

11. See 1 MOORE, EXTRADITION (1891) § 102, pp. 132-134; also telegram from Acting Secretary of State to the American Ambassador to Turkey, 2 FOREIGN RELATIONS (1907) 1070, advising "since condemnation by default is not recognized in the United States, a fugitive in this condition is in the same situation as a fugitive merely charged with crime . . ."

12. *Ex parte Fudera*, 162 Fed. 591 (C. C. S. D. N. Y. 1908), *appeal dismissed*, 219 U. S. 589 (1911); *Ex parte La Mantia*, 206 Fed. 330 (S. D. N. Y. 1913); see Hyde, *A Report of a Recent Extradition Case:—Re Macaluso* (1912) 7 ILL. L. REV. 237.

13. Citing a Swiss case, *Extradition Marcellin*, 44 Arrêts du Tribunal f. s. 177 (1918), wherein a similar treaty provision was construed to allow recourse to the law of the demanding country. The court explained that since an extradition demand presupposes punishability, refusal of extradition where punishability does not exist "follows naturally" and express provision was unnecessary; but no such presumption applies to the law of the asylum and express stipulation for its application was required.

14. Great reliance was placed upon two Argentine cases, *Extradition of Mastrangelo*, 71 Fallos 182 (1897) and *Extradition of Viscussi*, 103 Fallos 181 (1907), the only authorities cited supporting application of the foreign prescription law for charges to a conviction *par contumace* despite the fact that the foreign court would have applied the prescription for convictions. But examination discloses that in both cases the law applied was the domestic prescription on charges (in the earlier case, according to the rule where no treaty existed; in the later case, because the intervening Italo-Argentine treaty provided double limitation). That Caputo's extradition, under the American view of convictions *par contumace* (note 11, *supra*), would be barred by the expiration of any New York prescriptive period limiting public action for murder, seems evident. Beyond authority for this proposition, the cited cases should not be extended.

recognize that there is only resemblance, and not identity, between convictions *par contumace* and common law charges. A proper procedure would acknowledge this lack of identity by reference back to the original category with the consequent application of the twenty year prescriptive period employed by French courts. It is claimed that to do this is to subordinate the treaty to French law, yet patently the only justification for examining the limitations of the demanding country is to anticipate their application, and it is undisputed that France can try, and execute Caputo after extradition occurs. The dissent thus would present the paradox of a man, who could be prosecuted by either country had both crime and apprehension occurred within its territory, achieving immunity through disparity between the two systems of jurisprudence. Such an interpretation of a treaty of extradition does violence to its ultimate purpose—the assurance that no major criminal, through flight, can escape trial by his natural judges.

The broader problem of whether the statute of limitations of the requesting country should be a determinant factor in extradition proceedings remains unanswered. Reference to this statute was a necessary step in the reasoning of both majority and dissent, although the former opinion mentioned it merely to avoid a ruling on the very question posed. While some authorities on international law endorse double limitation,¹⁵ writers are generally agreed, despite the prevalence of treaty provisions to the contrary, that the statute of the requesting country should be the only proper test.¹⁶ If ability to prosecute is viewed as an integral part of criminality, it may be argued that a man cannot be deprived of his asylum until it is shown by reference to the limitation laws of the demanding country that he remains in fact a criminal; that he can hardly be considered "fugitive" from a justice powerless to act against him; and that any extradition proceeding should on this point be subject to challenge.

Such an approach seemingly misconstrues the nature of the extradition process. It is not properly a *trial* of the accused, but rather a *committal* for trial—only a *prima facie* case need be shown.¹⁷ All matters of defense, including the foreign statute of limitations, should be left for the courts of the demanding country, as in intrastate rendition.¹⁸ Jurisdiction in extradition proceedings may be challenged by habeas corpus, but the only jurisdictional facts required by most United States treaties are (1) that the person shall be charged with or convicted of one of the specified crimes, and (2) that he

15. *E.g.*, DRAFT CONVENTION ON EXTRADITION (1935) 29 (Supp.) AM. J. INT. L. 21, art. 4, at 22. For general discussion, see Comment on art. 4, *id.* at 99 *et seq.*

16. 1 MOORE, EXTRADITION (1891) § 373; BILLOT, TRAITÉ DE L'EXTRADITION (1874) pp. 220-221; DRAFT CONVENTION ON EXTRADITION (1935) 29 (Supp.) AM. J. INT. L. 21, art. 4, Comment, at 99.

17. *Benson v. McMahon*, 127 U. S. 457 (1888); 1 HYDE, INTERNATIONAL LAW (1922) 604, n. 1. For an account of the *Insull* case, in which the United States protested actual trial by the Greek court, see Hyde, *The Extradition Case of Samuel Insull, Sr., in Relation to Greece* (1934) 28 AM. J. INT. L. 307.

18. *Biddinger v. Police Commissioner*, 245 U. S. 128 (1917), 77 A. L. R. 902 (1932) (Statute of Limitations); *Charlton v. Kelly*, 229 U. S. 447 (1913), 114 A. L. R. 693 (1938) (insanity).

be found within the territory of the asylum country.¹⁹ Ability to prosecute is not specifically required. Nor for American courts is it an element which must be considered in determining whether a cause of action exists for extradition purposes. For while most continental jurisdictions consider the statute of limitations substantive in nature, inherent in the cause of action, it is here regarded as procedural, and this view, as the law of the forum, should prevail.²⁰ As a practical matter, such a solution avoids attendant difficulties of construction and possible misapplications, purposeless in view of the slight actual effect of a consideration of foreign law. For it may be presumed a nation will demand extradition only if it can prosecute—ulterior motives are met with the rule that only the crime specified may be tried²¹—and we are bound by the existence of a treaty to assume that the trial will be fair and any valid defense admitted. Perhaps the sole effect of a rule requiring application of the statute of limitations of the demanding country would be to permit arguments such as that of the instant dissent to defeat the purpose of extradition and the moral judgments of both nations.

19. *E.g.*, Great Britain [Webster-Ashburton Treaty (1842) art. X, 8 STAT. 572, at 576 (1867)]; Italy [Convention of March 23, 1868, art. I, 15 STAT. 629 (1869)]; France [Convention of Jan. 6, 1909, art. I, 37 STAT. 1526, at 1527 (1911)].

20. CHEATHAM, DOWLING AND GOODRICH, *CONFLICT OF LAWS* (1936) 371, citing Comment (1919) 28 YALE L. J. 492; RESTATEMENT, *CONFLICT OF LAWS* (1934) §§ 584, 585.

21. *United States v. Rauscher*, 119 U. S. 407 (1886); 1 HYDE, *INTERNATIONAL LAW* (1922) § 322; 4 MOORE, *DIGEST OF INTERNATIONAL LAW* (1906) §§ 596-602.